(1)

Supreme Court, U.S.
FILED

No.

021259 FEB 18 2003

In The

OFFICE OF THE CLERK

Supreme Court of The United States

October Term, 2002

In the Matter of RICHARD STEVENS,
(admitted as RICHARD ZELMA),
an attorney and counselor-at-law,

Petitioner,

- against -

DEPARTMENTAL DISCIPLINARY COMMITTEE
for the FIRST JUDICIAL DEPARTMENT,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

RICHARD STEVENS
Petitioner pro se
221 West 82nd Street
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February 18, 2003

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (9699)

252 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the trier of fact deprive petitioner of an opportunity to be heard, in violation of his due process rights guaranteed by the Fourteenth Amendment?

2. Did the court below exceed its power by relying on erroneous testimony that is tainted by unequivocal perjury and by using it to corroborate testimony proven to be chronologically impossible by independent objective evidence ?

3. Did staff counsel deprive petitioner of due process by coaching their two witnesses, and/or, remaining silent after they knew and/or should have known that their witnesses' testimony was perjurious ?

4. Are the substantive property rights of petitioner being deprived under the Fourteenth Amendment and does this impair petitioner's right to a livelihood in a sister state in violation of Article IV section 2 of the Constitution ?

5. Does Congress have the power to pass the American Disability Act pursuant to ¶ 5 of the Fourteenth Amendment , while inversely, lack the distinguishable power to abrogate the State's Eleventh Amendment immunity under ¶ 5 of the Fourteenth Amendment ?

6. Did the trier of fact improperly exclude petitioner's neurological medical expert and was it improper for them to conclude that petitioner made a full neurological recovery as of 1985 ?

7. Do the Younger and/or Burford abstention principles bar federal court jurisdiction, and/or warrant outright dismissal, when the plaintiff abandons the state appellate process after a final order was issued by an administrative body ?

8. Was the alteration of evidence relating to a prior admonition coupled with its continued use to the present charge of conversion, deprive petitioner of his First and Fourteenth Amendment freedom of speech and violate the *Ex Post Facto* Law under Article I section 10 of the Constitution ?

9. Does the continued misuse of a prior admonition, coupled with misapplying the mandatory statutory divestment exception doctrine in the field of domestic relations set forth by this Court in 1992, warrant supervisional review ?

RULE 24.1 STATEMENT

Pursuant to Rule 24.1 of the Rules of this Court, all of the parties whose judgment is sought to be reviewed, are listed in the caption.

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Point I A [vi]

Property interest protected under Fourteenth Amendment is a substantive right warranting procedural due process throughout the proceedings. Revoking license is not final until Appellate Division issues order. Due Process fluctuates over time. Badge of infamy is present in case at hand. D.R. 9-102 (b) (4) is not limited to insurance proceedings. It is improper to apply this standard with reciprocity effect as this deprives petitioner of his vested property livelihood and/or roperty /interest in sister state.....16

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PETITION

In The
Supreme Court of the United States

October Term 2002

In re Richard Stevens
Petitioner

v

Departmental Disciplinary Committee of State of New York
Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Stevens respectfully petitions for a writ of certiorari to review the order and decision of the Appellate Division State of New York, First Department, dated May 16, 2002.[1]

CITATION OF THE REPORT OF OPINIONS IN THIS CASE

The referee's decision dated August 25, 2001 is unpublished. [*App. D*, hereinafter referred to as "report"]. The hearing panel order of November 6, 2001, together with the denial of the initial motion to reconsider dated November 28, 2001 are unpublished. [*App. C*]. The Appellate Division's decision was rendered on May 16, 2002. [*In re Stevens*, 294 A.D. 2d 1, *at App. B*]. The Court of Appeals denied leave to appeal on September 10, 2002. [98 N.Y. 2d 611, at *App. A*]. The same Court denied petitioner's motion

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[1] Petitioner's exhibits that were admitted during the hearing are identified as "RA-RV". The exhibits that were attached and excluded to petitioner's testimony, are identified as "S1-S41". The appellees evidence is identified as D.C. 1-28. The referee's is "R-1-13". All reference to transcripts are to hearing before referee dated June 21, 2001, June 25, 2001 and June 27, 2001. Those marked with an asterisk (*) are attached to accompanying appendix. [*App.*]

to reargue on November 19, 2002. [99 N.Y. 2d 532]. The prior admonition is predicated upon *Levine* v *County of Westchester*, 828 F. Supp. 238 (1993) [hereinafter referred to as # 97-500]. That was affirmed by the Court of Appeals in an unpublished decision dated March 2, 1994. [# 97-500 at "A" 30-33]. Thereafter, the decision of the United States District Court for the Southern District of New York sanctioning petitioner was issued. [*Levine* v *County of Westchester* 164 F.R.D. 372 (S.D.N.Y) (1996)]. The Second Circuit's decision dated June 3, 1997, is unpublished. [# 97-500 "A3-A4"] The petition for a rehearing was denied on June 18, 1997. ["A" 2]. The petition for certiorari was denied on November 3, 1997 . [*R. Zelma* v *Mcleod* , 522 U.S. 952, (1997)]. The disciplinary Committee issued its private admonition on April 28, 1998. ["D.C.28" at *App. T*].

BASIS FOR JURISDICTION.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions are the First Amendment; Sections 1 & 5 of the Fourteenth Amendment; Article I Sec. 10 and Article IV section 2, and the Eleventh Amendment. The Equal Opportunities for Individual with Disabilities Act 42 U.S.C. ¶12101 (a) (2) (6) (8) & (9) ; 42 U.S.C. ¶ 12112 (d) (3)(A) (B)(C) (4) (B); 42 U.S.C. 12131 (1)(A) (B) (C) & (2) ; 42 U.S.C. ¶'s 12131 & 12132; 42 U.S.C. ¶ 12202; & 42 U.S.C. ¶ 12203 (a) (b) & (c), are set forth. 42 U.S.C. ¶ 1983 before and after 1996, together with Disciplinary rule D.R. 9-102 (b) (4); New York Judiciary Law ¶ 90 (6) and 22 N.Y.C.R.R. ¶ 603.4 (d) (e)(1) (i) (ii) (iii) (iv); 22 N.Y.C.R.R. ¶ 605.13 (p) (1); and 22 N.Y.C.R.R. ¶ 605.16 (a)(1), are set forth in Appendix 1. [*App. 1*]

STATEMENT OF THE CASE

The questions presented here are threefold. First, did the trier of fact deprive petitioner of an opportunity to be heard regarding the charge of conversion, by excluding critical evidence fully supporting the premise that the two witnesses who testified against petitioner orchestrated their testimony and did so in direct response to petitioner's timely filed verified answer ? In conjunction with this inquiry, do three separate reversals and/or rulings corroborate this point. The first was on the initial day of the hearing when the "surprise witness"[Arkin] was called by staff counsel. Both staff counsel and the referee agreed that petitioner would be allowed an adjournment for cross-examining this witness. This was reversed on that day.

Second, the surprise witness testified that he was at the initial meeting of December 11, 1996 at the offices of Mr. Chovnick Esq. The truth or falsity of this fact is crucial to petitioner's defense. The referee and staff counsel refused to permit petitioner a one day adjournment to allow Mr. Chovnick to testify to the contrary. [i.e. that Arkin was not at the December 11 meeting] The record reflects a direct connection between petitioner's request and the hastening of the pace of the hearing, a clear attempt to prevent Chovnick from testifying. Thereafter, the referee, hearing panel, and Appellate Division, all refused to admit the affidavits of Mr. Chovnick from June 27, 2001 and onward, which make clear that the testimony of the surprise witness that he was at a particular place was perjurious. Mr. Arkin's testimony was material, contrived, and orchestrated. It was not a mistake through faulty memory but an intentionally false statement intended to corroborate the testimony of his mother/ employer, Ms. Thompson.

The third connecting ingredient to the denial of an opportunity to be heard was when petitioner was about to orally testify on June 25, 2001. The referee made clear on two separate occasions that he would accept the written testimony in lieu of oral testimony. Petitioner submitted his written testimony on the condition that all of the exhibits

relied upon by petitioner in his testimony would be admitted as well. Six weeks later, on August 4, 2001, the referee, *sua sponte,* excluded this probative evidence, evidence which implicitly proved that Thompson had knowledge of the withdrawals and which explicitly impeached the testimony of Thompson.[2] This reversal was in direct response to correspondences regarding the prior admonition. [# 97-500 *infra*, Point I [a] [iv] pages 13-15].

2. Did the trier of fact deprive petitioner of a separate constitutional and federal statutory right by excluding probative neurological medical evidence that explains and dispels any wrongdoing ? Does Congress have the power in 1990 to pass Title II of the American Disability Act under ¶ 5 of the Fourteenth Amendment, while not abrogating the State's Eleventh Amendment immunity ? These questions are interrelated with a case now pending before this Court. [*Medical Board of the State of California v Hason*, # 02-479; 123 S. Ct. 561 (2002) hereinafter referred to as *Hason, infra* Point II pages 18-26]

3. Did the trier of fact deprive petitioner of his First Amendment right to speak on his own behalf in defending his legal position concerning a complaint, signed on July 8, 1992, which led to a private admonition ? Is the use of the prior admonition on a newly formed evidentiary basis to support the present charge of conversion constitutionally improper ? Does the reliance on the federal court rulings, coupled with the continued misapplication of the divestment doctrine by the federal courts, warrant this Court's supervisional authority ? [*infra*, Point III pages & 27-30].

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[2] False representations by the complainants before and after their actual testimony was preserved. [see Point I [A] [v] *infra*,pages 15-16, cf. i.e. *Cardinale* v *Louisiana*, 394 U.S. 437, 438-439 (1969), citing *Owings* v *Norwood*, 5 Cranch 344 (1809); and *Crowell* v *Randell*, 10 Pet. 368 (1836) . The written decisions of the referee and Appellate Division set forth the remaining constitutional issues on the face of the decisions. [see i.e. *Bryant v Zimmerman*, 278 U.S. 63, 67, 68-69, 71 (1928) further citations omitted]

Facts underlying the hearing

On or about October 9, 1999, petitioner was served with an unverified complaint signed by Laurie Thompson, his former client in a real estate matter. The heart of the allegation was that petitioner withdrew funds from an escrow account. In a timely verified answer dated December 20, 1999, [*App. F*] petitioner answered that he was permitted to withdraw the funds with the consent and knowledge of Thompson, as attorney's fees were due. This was established by an oral retainer agreement, entered on December 11, 1996 in the office of Mr. Chovnick Esq., which established a fee of $ 300.00 per hour. This fee applied to the perfection of the appeal which was to be exclusively handled by petitioner. This was set forth in the correspondence of Mr. Chovnick dated June 4, 1998 and his affidavits from June 27, 2001. [*App. G, at 132a; 118a; 114a and 110a*].

REASONS FOR GRANTING THE WRIT

I. The decisions of the Appellate Division and referee deprived petitioner of his opportunity to be heard. They clearly relied on erroneous testimony.

(A)(i) *Opening Statement by staff counsel*

In his opening statement, staff counsel Bratton made the following four prevalent statements. That this was not an "account stated" [TRH 32* lines 25 TRH 33* line 10* *at 50a*]; that he was calling Mr. Arkin as a "surprise" witness" [TRH 22* lines 17-24; - TRH 24* lines 6]; that Thompson *and* Arkin will prove some meeting in the winter of 1998 [TRH 29* line 3-7; also TRH 30* lines 5-7]; and that Thompson will prove that she did not owe any money for the time frame of August 8, 1997-February 5, 1998. [TRH 32* line 16- TRH 33* lines 1-4; all of the above at TRH 19-33 * *at App. E, pages 40a-52a*].

Point I (A) (ii)

Outright perjury is directly linked to overcome verified answer. This establishes that there is an infirmity of proof warranting review by this Court. Reliance on tainted testimony is erroneous. Corroborating such testimony to other witness is constitutionally improper when no independent objective evidence does the same. This deprives petitioner of due process and is clear injustice.

(a) Oral retainer agreement of December 11, 1996 is unscathed by perjury of Arkin.

The pre-hearing stipulation signed by former counsel to petitioner Mr. Supple Esq. and Mr. Bratton, on April 19, 2001, did not identify Steve Arkin as a witness, but did make clear that Mr. Chovnick was petitioner's main witness. [see referee exhibit "R6"at *App. W5* also see TRH 19*-20 at *App. E*]. The referee and Mr. Bratton immediately recognized that to call this witness on the eve of trial without any notice was improper. The referee made clear that petitioner would be allowed an adjournment to cross-examine the surprise witness. [TRH 23* lines 7-14, *App. E at 43a*]. This ruling was the first among many for which the referee reverses himself in midstream to the detriment of petitioner. [TRH 208* lines 2-16; *at App. E at 55a*].

On cross-examination, the surprise witness shockingly testified that he was at the "first" meeting between Ms. Thompson, Mr. Chovnick, and petitioner, which took place at the office of Mr. Chovnick on December 11, 1996. [TRH 210* lines 4-5, *at 55a*] Arkin testified that he witnessed Thompson issuing a check of $ 10,000.00 at that meeting. [TRH 211*line 6; TRH 202-204*; *App.E*].

The purpose of Arkin's fallacious testimony is self-evident. Arkin is attempting to raise a question of fact as to the oral retainer agreement set forth in petitioner's verified answer. The correspondence of Mr. Chovnick dated June 4, 1998, was set forth in petitioner's verified answer. [see *App.*

F ¶ 9 *at 64a*; also "S28"] The hearing had commenced on Thursday June 21, 2001. Both witnesses for the Committee testified on that day. The referee then adjourned the case for one day for a funeral. [TRH 40 lines 25 –TRH 41 line 3].[3]

The testimony of Arkin being at the "first meeting" on December 11, 1996, is not a mistake that one can conceivably claim was through "fault of memory". [*The Santissima Trindad*, 7 Wheat 283, 338-339 (1823)].

As set forth by the Honorable Judge Story:

> Ct: ***If*** the circumstances respecting which the testimony is discordant be immaterial, and of such a nature, that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the ***discrepancies arise from the infirmity of the human mind, rather than deliberate error.***
> ***But*** where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, ***or his being in a vessel on a particular voyage,*** or living in a ***particular place***, ***if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood;*** and **courts** of justice, under such circumstances, ***are bound***,upon principles of law, and in ***morality of justice,*** to apply the maxim *falsus in uno falsus in omnibus*. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses of

[3] The mitigation hearing can alter findings made at the fact-finding hearing. Mr. Chovnick and Mr. Grossman ["RX" *at App. 127a*] were scheduled to testify on June 28, 2001. [see TRH* 421 & 429*; and affidavit of Mr. Grossman dated July 2, 2001 and affidavit of Chovnick dated June 27, 2001 each at *appendix G.*] This is within the seven day period. [22 N.Y.C.R.R. 603 (p)(1)]. The referee's perception that petitioner's was fabricating Chovnick as a "stalling" tactic, [see page 16 of *App.D* at *34a*] is literally disproved by the pre-hearing stipulation itself. ["R6" at *App. W5.*]

the libellants have been ***exposed*** at the bar with great force and accuracy; and they are so numerous that, in ordinary cases, **no court** of justice could venture to **rely** on it ***without danger*** of being ***betrayed into the grossest errors***."[emphasis added, *The Santissima Trinidad*, 7 Wheat 283 at 338, 339, 340 ; 5 L. Ed. 454 (1822) quoted at page 20 of motion for leave to appeal dated June 20, 2002; quoted at page 30 of brief to Appellate Division dated February 19, 2002; quoted in motion to reargue dated October 9, 2002, page 25].

Following the testimony of the surprise witness, petitioner promptly met Mr. Chovnick regarding his ability to testify. He made clear that the "first" time he could appear was 2:00 p.m on Wednesday, June 27, 2001. [TRH 252* & 391* lines 4-7, at *App. M 162a-163a* & affidavit of Chovnick, at *App, G* dated June 27, 2001, *at 118a; 114a; 110a*] The affidavits of Mr. Chovnick dated June 27 2001, December 15, 1999, October 3, 2001, November 15, 2001, February 21, 2002, June 13, 2002, are all separately attached to *App. G*. Each one that preceded the cross-motion dated February 22, 2002, were attached thereto. They make clear, under the penalty of perjury, to the Appellate Division, Court of Appeals, and the Committee, that the testimony of Arkin to the effect that he was at the meeting of December 11, 1996, is blatantly false. Chovnick and petitioner are "100% certain" that Arkin was not at the meeting of December 11, 1996. [see testimony of petitioner, exhibit "S" page 3 & petitioner's testimony at TRH 314*, *App. G at 131a*].

The doctrine of *falsus in uno falsus in omnibus* is squarely applicable to the type of testimony that Arkin so boldly set forth in court. He was certain that he was at the "*particular place*", namely, the office of Mr. Chovnick the "first time his mother met him." [*Trinidad, id.* at 338 TR* 209-211-*App. E at 55a*]. As a result of this "deliberate falsehood" [*id.*], one which cannot be attributed to faulty memory, [*id.*], all of Arkin's testimony must be disregarded. It is neither reliable nor trustworthy. Petitioner did immediately submit a motion to reopen filed under 22 NYCRR 605.16(a). [see exhibit "C" to cross-motion to Appellate Division dated February 22, 2002]. All of

Chovnick's affidavits speak for themselves and are admissible.[at *App. G*]. [4] Instead of recognizing that Chovnick makes clear that Arkin was not at his office on December 11, 1996, the referee in bizarre fashion finds that Chovnick discusses "conversations with Thompson and her son". [emphasis added see *App. D*, at *34a*].

One standard that an attorney must meet in a petition to this Court from disciplinary charges is that there is an "*infirmity of proof* as to facts.... to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject" [emphasis added see *Selling* v *Radford*, 243 U.S. 46, 51, (1917)].

Perjury taints the proceedings in both civil and criminal proceedings warranting its dismissal. As set forth by this Court:

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[4] On June 25, 2001, staff counsel initially objected to any stipulation concerning Chovnick's affidavits.[TRH 344* lines 10-15, *App. N at 164 a*]. Immediately after being informed that Chovnick will testify to the fact that Arkin was not at the meeting of December 11, 1996, [TRH 345* lines 1-3, at *App. N* at *164 a*] Mr. Bratton reversed himself and stipulated that he would consent that Chovnick would testify that the terms of the oral retainer agreement was $ 300.00 per hour. [see TRH 345* lines 6-14, at *App. N at 165a*]. On June 27, 2001, once petitioner relied on this and it was clear that Chovnick would not be appear on his "first" available day, [*App. M* at 162a] staff counsel and the referee reversed themselves again by only consenting to Chovnick's affidavit to speak of "character."[TRH 441*, at *167a*, cf. TRH 435* at *App. N*; at *166a* see *App. D "report" of referee at 33a*].

The Appellate Court may review and reverse on the part of credibility if and when: " (i) the written evidence or some undisputed fact renders the credibility of the **oral** testimony **extremely doubtful**" [emphasis added, *Orvis* v *Higgins*, 180 F. 2d 537, 539 (CA2) (1950); Point III (d) of main brief dated February 19, 2002; and all arguments to hearing panel; referee and thereafter to Court of Appeals]. The referee's perception was that withdrawing of funds, by itself, was conclusive evidence to conversion and that Chovnick's proposed testimony was "irrelevant". [TRH* 361 lines 9-TRH 362 line 10 – TRH 363 lines 10-14 , *App. Q at 175a*].

" When uncontested challenge is made that a finding of subversive design by petitioner was made in part the product of three ***perjurious witnesses***, it ***does not remove the taint*** for a reviewing court to find that there is ample innocent testimony to support the Board's findings. [emphasis added, *Communist Party of U.S.* v *Subversive Activities*, 351 U.S.115 (1956) at 124]. *We cannot pass upon a record containing such challenged testimony*.." [emphasis added *id.* 124-125; also see *Mitchell* v *United States*, 368 U.S. 439 (1962)]

I (A)(ii)(b) Thompson's testimony respecting possession of the premises is explicitly impeached by the documented evidence attached to petitioner's testimony. Furthermore, exclusion of evidence that implicitly proves that her testimony was fabricated in order to overcome petitioner's timely filed verified answer, deprives petitioner of opportunity to be heard.

Thompson testified that she was never informed by anyone that she would be risking possession of the premises if she elected to appeal the matter.

> Stevens: Were you willing to sacrifice possession of the apartment ?
>
> Thompson: **No, I was not willing to sacrifice possession of the apartment.**
> [emphasis added TRH 184 lines 9-20]

Petitioner offered documentary evidence to disprove this claim. [see Exhibits "S6" "S7: "S8" "S10" "S11" "S19" "S20" "S21" attached to petitioner's testimony *"RS"*]. Thompson's trial attorney's affidavit dated October 5, 2001, fully supports the premise that she was informed that possession was the risk and that she was willing to accept it. [at *App. H*, at *134a*; also TRH 313* *at 137a*] Mr. Stern Esq. made clear that in November of 1996, he warned Thompson that proceeding with an appeal would be risking possession which Thompson was willing to accept. [see Motion to reopen to hearing panel, see ¶ 29 exhibit " Y" of cross-motion to Appellate Division dated February 22,

2002]. Clearly, someone who is willing to sacrifice an apartment worth $1.5 million dollars, is willing to bear the costs of an appeal, especially since one would be entitled to be reimbursed attorney's fees had she prevailed.[5]

Point I (A) (iii)

The re-writing of the testimony after independent objective evidence proves that it was a chronological impossibility, is excessive and an abuse of discretion. Attempting to overcome the impossibility by

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[5] The concept that the exhibits [i.e. testimony and/or affidavits, or correspondences of Chovnick and petitioner] has no relevance to the "central issue" of " consent and knowledge", either "implicitly or explicitly", nor to there being an "account stated", is fatally incorrect. [see App. B at *16a* of May 16, 2002 decision,] The issue of the oral retainer agreement being $ 300.00 per hour and entered in the offices of Mr. Chovnick Esq. on December 11, 1996, is crucial. This was the heart to the bill commencing from November 15, 1997 – February 5, 1998. [see D.C.# "4"]. Petitioner's answer makes clear that there was part/payment after the bill of November 15, 1997 was served, that there was no accord and satisfaction and that Thompson was silent to the balance due.[*App. F*]. There is not one word in any correspondence of Thompson dated April 27, 1998, and May 11, 1998, [D.C. # 7; & "RL"] concerning any demand for an accounting for the time period of August 8, 1997-February 5, 1998. Thompson's testimony to the effect that she had made verbal demands on an "every day" basis from November 16, 1997 and onward, is not supported by the correspondences of April 27, and May 11, 1998. [TRH 156 * lines 13-24; and TRH 110* lines 10-12. *App. P* , at *171-172a*]. Petitioner's letters of April 21, 1998 and May 6, 1998 are probative, as they specifically distinguish the three time frame periods for which bills were served upon Thompson. [see "S26 & S27"]. Excluding petitioner's answer and the letters of petitioner to prove that the testimony of Thompson was of "recent fabrication", in an attempt to overcome petitioner's timely filed answer, is error. [see *"S1 and S1a" "S26"; "S27"; "S28" "S29" and "S16; App. F* , 60a-109a] Just as there was never any dispute or response to the oral retainer agreement by Arkin and Thompson after they were served with the correspondences of Mr. Chovnick dated June 4, 1998 and petitioner's of June 8, 1998, [See appendix G; "S28-29"] there was never any dispute raised to the time period of August 8, 1997-February 5, 1998.

corroborating the testimony of a witness who has committed outright perjury is flagrant injustice.

The trier of fact cannot sit down and re-write the sworn testimony of the witnesses in order to overcome its impossibility and/or to conform to the opening statement of staff counsel that a meeting took place in the winter of 1998. [TRH 29* lines 3-7- *App. E* at *48a*]. Ms. Thompson made clear on two occasions that petitioner informed her in "August of 1997" that he withdrew funds from the escrow account. [TRH 112* lines 4-6; & & 128 lines 15- TRH 129 lines 1-5, at *App. E, 58a-59a*] The referee made clear that this is " on the record". [TRH 112* lines 20-25, *App. E at 58-59a*]. Arkin also testified that this meeting took place when petitioner was "in and out" "so often" from their premises. [TRH 204* lines 1-2, at *App. E, at 54a*]. He further stated on cross-examination that he was not certain of the exact date but it was at the time that the appeal of the judgment of August 1997 was discussed. [TRH 214-215*, *Appendix E at 56-57a*]. Petitioner rested after hearing Arkin testify that the time of the meeting with petitioner was the summer of 1997, as petitioner knew that this was a chronological impossibility that he would be able to prove in his case in chief. [*App. J, at 147a* and exhibit "RS"at p. 3]

The impossibility of this "meeting" was set forth to the referee in detail in the statement of facts and conclusions of law dated July 18, 2001. [see Point III pages 45-51*; *App. J 147a-153a*; also see Point II (b) (iii) pages 56-61 to statement of facts to hearing panel dated October 23, 2001; and Point IV (b) of brief to Appellate Division pages 72-78 dated February 19, 2002].[6] The only time petitioner was at the office of Thompson "so often" was the summer of 1997. In order to establish this, petitioner called Mr. George Zelma to the stand. [7] Mr. Zelma's testimony corroborated Arkin's as to when petitioner was "in and out" so often.

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[6] The bank records, submitted as D.C. # 3, proves that there were no withdrawals in the summer of 1997. [see *App. J* . at *147a-153a*].

[7] Mr. Zelma had no notice whatsoever of the proceedings until the date that he appeared at the hearing, on June 25, 2001.[TRH 252 lines 7-10 & TRH 293 lines 10-14 , "report" at App. D. p. 3 ft.note 3, *at 23a*].

The time was in July of 1997, when petitioner referred the *Wexler* case to his brother, and there were "marathon" telephone conversations from Thompson's home concerning the subject with the adversaries. [TRH 260-261*; at *App. L*; also see Thompson TRH 101 line 8-9; TRH 150 lines 1-3; also see ¶ 's 10-13 of cross-motion to Appellate Division dated February 22, 2002]. The referee noted that petitioner could "connect" the testimony of Zelma in his testimony. [TRH 264* lines 2-5, at *App. L, at 157a-161a*].

The "report" ignores the impossibility of this "meeting" on two occasions by corroborating Thompson testimony with Arkin's. [see page 8 and 10 of "report" *App. D, at 28a and 29a*]. The appellate panel does the same. [see May 16, 2002 decision, *App. B. at 11*].

Finding that this meeting actually took place, after petitioner proves that the witness who the referee is relying upon marches into court and blatantly testifies falsely to being at a particular place and time at another crucial meeting, and when petitioner proves by independent objective evidence that the time that these two witnesses testify to was a chronological impossibility, [D.C. #3] establishes that the trier of facts have "clearly exceeded its powers,"and/or has "decided erroneously on the testimony." [*Ex Parte Burr*, 9 Wheat 529, 531 (1824)] With all due respect, this is "highly irregular". This has culminated in "clear injustice." [*Ex Parte Bradley*, 7 Wall, 364, 378, 379 (1868)].

Point I A (iv)

Sua Sponte exclusion of material evidence annexed to petitioner's testimony of June 25, 2001 deprives petitioner of due process.

On June 25, 2001, the referee himself suggested that the written testimony of petitioner ["*RS*"] substitute for oral, in court testimony. Petitioner agreed on the condition that all of the evidence the testimony referred to was admitted in the record. [TRH 329* lines 4-11; TRH 385* lines 8-23; at *App. R*, at *177a-178a*; also see TRH 374 lines 16-19]

Six weeks later, on August 4, 2001, the referee reversed himself. This was immediately after he received the correspondence of petitioner dated August 2, 2001.[see *App. I*, at *138a-143a*, see exhibit "L" & "M" of cross-motion to Appellate Division dated February 22, 2002]. The August 2, 2001 memo concerned itself with the prior admonition. [# 97-500, at *App. I*] Petitioner was responding to staff counsel's letter dated July 31, 2001. [see exhibit "K" to same cross-motion].

The *sua sponte* exclusion by the referee on August 4, 2001, [*at 144a*] is directly connected to the prior admonition that is predicated upon the federal court's conclusion that the *Ankenbrandt* case was completely immaterial. The federal court concluded that the newly defined divestment doctrine in the field of domestic relations was restricted to diversity disputes. [Point III *infra*, pages 27-30]. This perception is, with all due respect, legally incorrect. The timing of the exclusion of evidence, coupled with the use of the prior admonition as evidence to prove petitioner's behavior as far as the charge of conversion, [Point III *infra*] strongly supports the "supervisional" authority of this Court. [see *Frazier* v *Heebe*, 482 U.S. 641, at 645-646 (1987), quoting , *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White J. concurring) also *In re Snyder*, 472 U.S. 634, 643 (1985); *Theard* v *United States*, 354 U.S. 278, 282 (1957); *Ex Parte Burr*, 9 Wheat, 529, 530 (1824)].

The correspondence of petitioner of August 2, 2001, was neither defiant nor harsh in presenting his point on *Ankenbrandt* or *Suter*. [*at 138a*; cf. i.e. *In re Snyder*, 472 U.S. 634, 646-647 (1984)]. Petitioner merely set forth his position that he had accurately identified the issues in 1992, and that the recent cases strongly suggest that this was so. [Point III *infra*]. To punish an attorney for doing so is arguably a denial of his First Amendment right to speak and is fundamentally against all "important" principles of the legal profession "that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar" [see *Konigsberg* v *State Bar of California*, 353 U.S. 252, 273 (1957); further citations Point III *infra*].

Point I [A] [v]

Staff counsel's argument that the witnesses testifying falsely under oath is immaterial as they are not "parties" to the proceedings is fundamentally incorrect and deprives petitioner of due process. [***Point V*** *of petitioner's briefs dated February 19, 2002, and/or* ***Point VIII*** *of brief to Court of Appeals dated June 20, 2002, incorporated herein by this reference, at 174a]*

Upon the discussion between the referee and petitioner on the point that the government cannot continue the matter when the complainant's testimony is fatally unreliable, Mr. Bratton made clear that this was none of his business, as Thompson and Arkin were not "**parties**" to the proceeding. [TRH 362-364* *App. Q , at 174a*]. The underlying point is as follows. Neither the independent source doctrine, [*Seguria* v *U.S.* 468 U.S. 796 (1984)] nor the inevitable discovery doctrine, applies in the case at hand. [*Nix* v *Williams*, 467 U.S. 431 (1984), see ¶ 52 of petitioner's cross-motion to Appellate Division dated February 22, 2002]. All of the facts and documents that staff counsel obtained or had knowledge of came directly from Thompson. [TRH 362-364* *App. Q 173a-176a*].

It is well understood that the state official cannot process a complaint based on such material as it is " unlawful to make false reports to the police". [see exhibit "S37" citing, *Florida* v *J.L*, 529 U.S. 266, 276, concurring opinion (2000)]. This includes "false information" offered to a "public servant" and or a "political subdivision." [see NY Penal Law ¶ 175.35]. Petitioner distinguished alleged fraud on the part of the complainant, with actual testimony under oath under the penalty of perjury. [see Point V page 62 of brief dated February 19, 2002 distinguishing ¶ 20 November 10, 2000 affidavit to staff counsel, and cf. i.e. *Geiger* v *Jenkins*, 316 F. Supp. 370, 374 [U.S. D.C. Ga.] (1970)]. Neither made any difference to the Committee. They specifically made clear that Thompson was not a party and that it was immaterial where they got the evidence from, as petitioner's admitting to withdrawing funds is proof

positive that conversion was admitted to.[TRH 362* lines 6-TRH 363* lines 16, and TRH 363 lines 3-5, at *App. Q].

Point I [A] [vi]

Property interest protected under Fourteenth Amendment is a substantive right warranting procedural due process throughout the proceedings. Revoking license is not final until Appellate Division issues order. Due Process fluctuates over time. Badge of infamy is present in case at hand. D.R. 9-102 (b) (4) is not limited to insurance funds. It is improper to apply this standard with reciprocity as this deprives petitioner of his vested property interest in sister state.

Petitioner's license is a "property" interest. It was already "conferred". [see i.e. *Arnett* v *Kennedy, 416 U.S. 134,* at 167 (1974) Powell, J. concurring, citing *Goldberg* v *Kelly*, 397 U.S. 254, 261-263 (1970); *Bell* v *Burson*, 402 U.S. 535 (1971); *Board of Regents*, v *Roth*, 408 U.S. 564 (1972); *Perry* v *Sindermann*, 408 U.S. 593, (1972); also see i.e. *College Savings Bank* v *Florida Prepaid Postsecondary Ed. Expense Board*, 527 U.S. 666, 675 (1999)]. It is only when the Appellate Division renders its decision that the process is "final". [see i.e. *Arnett* v *Kennedy*, 416 U.S. 134, 185-186 (1974) White J., concurring and dissenting].

"Due process" fluctuates over time. It is not measured by a "yardstick." [*Joint Anti-Fascist Committee* v *McGrath*, 341 U.S.123, 163 (1951) Frankfurter J. concurring] Where the State attaches a "' badge of infamy"' to the citizens, "due process comes into play." [*Wisconsin* v *Constantineau*, 400 U.S. 433, at 437 (1971) citing *Wieman* v *Updegraff*, 344 U.S. 183, 191 (1952)]. A "precious liberty" is to "work" in his profession. [*Peters v Hobby*, 349 U.S. 331 at 352, (1955) Douglas J. concurring]. "These are adversary proceedings of a quasi-criminal nature."[*In re Ruffalo*, 390 U.S. 544, 551, (1968)]. " It is established that a conviction obtained through use of false evidence, known to be such by representatives of the State,

must fall under the Fourteenth Amendment". [*Napue* v *Illinois*, 360 U.S. 264, 269 (1959) citing *Mooney* v *Holohan*, 294 U.S. 103 (1935); *Pyle* v *Kansas*, 317 U.S. 213 (1942)].

Moreover, the referee made clear on the record from the very outset of the proceedings, that D.R. 9-102 (b) (4) was immaterial to him as that statute only pertained to "**insurance**" proceedings. [TRH 47* lines 19-21, *App.S* at *App. 179a*]. In conjunction with this standard of review, it was the referee, not petitioner, who made clear on more than one occasion that consent of a client to the withdrawal of funds was "immaterial". [see TRH 348* lines 7-17 at *App. 180a*; TRH 308* lines 23 – TRH 309 line 2, at *App. S, 180a*; TRH 362* lines 6-8; at *App. Q at 175a*] The findings by both the referee and appellate panel who claim that petitioner argued that he could just withdraw funds without any consent is plainly invalid. [see *App. B* at *13a*; and "report" at *App. D, at 37a*]. The record disproves this perception. [see TRH 50* line 22-TRH 51 line 1, at *App. S, at 181a*].

To misconstrue the substance of D.R. 9-102 (b) (4) cannot be deemed to be state law and/or a local rule. [cf. *Erie R. Co.* v *Tompkins*, 304 U.S. 64, at 78 (1938)]. [8] It is not merely a rule. [cf. *Frazier* v *Heebe*, 482 U.S. 641, 654 n. 4, dissenting opinion, Rhenquist C.J. (1987)]. It cannot be deemed to be an "independent" state law outside the scope of Article III. [see i.e. *Michigan* v *Long*: 463 U.S. 1030 at 1040, 1042 (1983)]. As reciprocity is presumed, [see i.e. *Selling* v *Radford*, 243 U.S. 46, at 49 (1917)] the misapplication of D.R. 9-102 (b) (4) violates petitioner's "privilege and immunity" as guaranteed by

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[8] Article IV section 2 is predicated upon the Fourth Article of the Articles of Confederation " privileges and immunities". This pertained to" ingress and regress to and from any other State and shall enjoy therein all of the privileges of **trade** and **commerce** subject to *same* duties." [emphasis added *Hicklin* v *Orbeck*, 437 U.S. 518, at 532 (1978), citing *Baldwin* v *Montana Fish* 436 U.S. 371, at 379 ft. note 17 (1978); also see *Shapiro* v *Thompson*, 394 U.S. 618, at 630 ft. note 8 (1969), also see *Ward* v *Maryland*, 12 Wall 418, 430 (1871)].

Article IV section 2 of the Constitution. [see i.e. *Supreme Court of New Hampshire* v *Piper*, 470 U.S. 274, 283 (1985); *Toomer* v *Witsell*, 334 U.S. 385, 398 (1948); *Baldwin supra*, , 436 U.S. 371, 384-385 (1978); also see *Hicklin* v *Orbeck*, 437 U.S. 518 (1978)] [9]

II: The Question Presented Is Important. A Pending Matter Before This Court Has Common Principles Of Law And Fact.

Point II [A] [i]

Titles I, II, and III are to be read in conjunction with one another. Exclusion of medical evidence, coupled with exhaustion of State judicial remedies, distinguishes this matter with the pending Hason case.

(a) Fatal error by trier of fact.

In the month of April 2001, petitioner and his former counsel had numerous conversations concerning petitioner's former neuro-psychologist, Mr. Jack Rattock. [see i.e. E-mail of April 19, 2001, at *App. K, 157a*]. This was made clear to the referee. [TRH 404 lines 10-15; TRH 451 lines 8-13]. Petitioner was finally able to reach his former neuro-psychologist who gave petitioner the number of another expert. [TRH 404 lines 16-TRH 405 line 9]. His name is Roland Parker, Ph.D. Mr. Parker then provided the referee with a request for an adjournment. [exhibit at *App. K, 156a*].

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[9] The strict products liability perception was made even clearer when the referee stated that the consent of the client was immaterial, as petitioner was "liable" to the "Bar" and the "Appellate Division".[TRH 302* lines 14-17; *App. S at App. 180]*. Apparently, there is confusion with a separate branch of cases where the attorney does obtain the consent of a client to withdraw funds but does so for "gambling" and/or narcotic purposes. [cf. i.e. *Matter of Kadish*, 299 A.D. 2d 78 Second Dep't (2002)]. This is when consent is irrelevant and this is not at issue in the present matter.

A near fatal accident which permanently damaged petitioner's left temporal lobe, is divided into two separate spheres. The first deals with "emotion", the second with high level analytical skills. [see Dr. Gordon Esq; October 9, 2002 *App. K*, at *154a* see motion to reargue to NY Court of Appeals dated October 9, 2002, Point III (A-D) pages 26-50]. The right to call an expert witness is warranted when the injury is neurologically related. [see i.e. *School Board of Nassau County, Fla.*, v *Arline*, 480 U.S. 273, at 280, (1987) quoting 45 C.F.R. ¶ 84.3(j)(2)(i) (1985), see i.e. *Hatch* v *Secretary of State of Maine*, 879 F. Supp. 147 (1995)]. The Court " should defer to reasonable medical judgment" on the subject of "neurology". [*Arline*, *supra*, at 280, 288 (1987)].

Titles I, II, and III are to be read as a unit. " The words of a statute must be read in their context and with a view to their place in the overall statutory scheme." [*Davis* v *Michigan Dep't. of Treasury*, 489 U.S. 803, 809 (1989); *United States* v *Morton*, 467 U.S. 822, 828 (1984); *Stafford* v *Briggs*, 444 U.S. 527, 536 (1980) citing *Brown* v *Duchesne*, 19 How. 183, 194 (1857)]. The provisions to prove that one is a qualified individual with a disability, crosses the line of the Titles. Petitioner's point is that a citizen has this right regardless of whether Microsoft is his employer, [42 U.S.C. ¶12111 (8)] or the State is in charge of issuing a license to him, [42 U.S.C. ¶12131 (2)] or, he is a golf pro and wants the private club accommodating him when he is on tour. [i.e. *PGA* v *Martin*, 532 U.S.661, (2001)]. To deny the right to a citizen to call a medical expert to prove a qualified disability is discrimination under all Titles. [42 U.S.C. ¶ 12112 (d) (3) (A) (B)(C) (4) (B); 42 U.S.C. ¶ 12132].

Petitioner testified that he had difficulty in keeping his positions in 1985 and 1986. [TRH 457 lines 5-7]. This, in and of itself, is a classic form of a disabled symptom that courts throughout the nation are well aware of. A post-syndrome disability is displayed by the inability to hold on to a position and or the failure to " regularly attend" work. [see *Stradley* v *Lafourche Communications, Inc.* 869 F. Supp. 442, 444 (E.D. La. 1994), citing *Carr* v *Reno*, 23 F.

3d 525, 529-530 (D.C. Cir. 1994); *Jackson* v *Veterans Administration* 22 F. 3d 277, 278-279 (11th Cir. 1994); and please see i.e. *Susie* v *Apple Tree Preschool,* 866 F. Supp. 390, 395-396 n. 11 (N.D. Iowa, 1994) citing *Tyndall* v *National Educ. Ctrs.* 31 F. 3d. 209, 213 (4th Cir., 1994), and *Law* v *United States Postal Serv.* 852 F. 2d 1278, 1279-1280 (Fed. Cir. 1988) *Walders* v *Garrett,* 765 F. Supp. 303, 309 (E.D. Va. 1991) aff'd. 956 F. 2d 1163 (4th Cir. 1992); *Santiago* v *Temple Univ.*, 739 F. Supp. 974, 979 (E.D. Pa. 1990) aff'd. 928 F. 2d 396 (3d. Cir., 1991)].

The Appellate Division reiterated the referee's conclusion that " since respondent worked in a legal capacity since 1985 and there was no suggestion of current incapacity, the referee found no causal connection between the 1984 accident and his 1997-1998 misconduct."[see *App. B, at 12a*; and "report"*App. D* at *33a and 35a* also see TRH 403 lines 21-24; TRH 432 lines 10-13]. To conclude this based upon the testimony of petitioner and to do so without any medical evidence to support their contentions, is error of law.

(b) Neurological recovery process separates high level analytical skills with emotional traits. Emotionally trusting Thompson verbal assurances is not conversion.

The exclusion of the neurological expert evidence at bar is a denial of procedural due process. [see i.e. *Popovich* v *Cuyahoga County,* 276 F. 3d 808, 812, 816-817 (6th Cir. 2002)]. And, as this Court acknowledged, the question is whether a petitioner such as the undersigned had the opportunity to be heard" and/or "opportunity of proving that contention", not what the odds are of his success. [i.e. *Cipollone* v *Ligget Group Inc.,* 505 U.S. 504, 510 n. 4 (1992) citing *Cipollone*, at 593 F. Supp. 1146, 1148 (NJ) (1984) also see NY Judiciary Law ¶ 90 (6)]. [10]

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[10] Although Mr. George Zelma is not a medical expert on the subject, his testimony does support the point that petitioner's emotions was the primary neurological issue in the present matter. ["informal relationship" was "confusing to him". TRH 488 lines 10-15; TRH 483

The emotional aspect of the recovery led to petitioner's "trusting" Thompson's oral assurances in 1997-1998. [TRH 477 lines 21-25 – TRH 478 lines 11; TRH 167 lines 24-25,]. This was deemed to be irrelevant by the referee. His limited view, shared with the reviewing panels, was constrained to a citizen who had a mental disability that prevented him from representing himself. [see i.e. *Matter of Eubank*, 293 A.D. 2d 41 (2002); and i.e. *Matter of Factor*, 292 A.D. 2d 103, (2002)]. There was nothing that an expert would testify to that would change the trier of facts position. [TRH 478 lines 2-13].

(c) Congressional power to pass ADA under ¶ 5 of the Fourteenth Amendment which have nationwide impact, is separate and distinct from whether they have the power to abrogate the State's Eleventh Amendment immunity. Inclusion of expert neurological medical evidence does fall within the gamut of Congressional intent. Detrimental ramifications from exclusion. Prospective preemption is proper.

In the present petition, the exclusion of the expert evidence does ***"have a "'congruence and proportionality between the injury to be prevented or remedies and the means adopted to that end."'*** [emphasis added, *United States* v *Morrison*, 529 U.S. 598, at 625-626 (2000) quoting *Flordia Prepaid Postsecondary Ed. Expenses Bd.*, v *College Savings Bank*, 527 U.S. 627, 639 (1999) and *City of Boerne* v *Flores*, 521 U.S. 507, 526 (1997)]. The case at bar appears to be distinguishable from Dr. Hason, as the Medical Committee did review his experts. Moreover, Dr. Hason is attempting to abrogate the State's Eleventh Amendment sovereign immunity and in his attempt to do so,

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lines 24 484 lines 2-6]. Therefore, without even knowing of how the temporal lobe divides itself into units or maps, Mr. Zelma corroborates what petitioner attempted to have Mr. Parker testify to in court. [see Point III [A] pages 26-31 of motion to reargue to Court of Appeals dated October 9 2002].

is abandoning the state judicial process in midstream.[11] [see Point II (A)(ii) *infra pages 25-27*]

The exclusion of both the neurological and documentary evidence coupled with barring petitioner's main witness from testifying to counter the surprise witness's testimony, are profound. It does "isolate"[12] petitioner; does impose upon him an inferior status in our society; does bar him from his continued recovery process in midstream which ostracizes him from being able to "fully participate" in society and to "pursue those opportunities for which our free society is justifiably famous". Finally, it will increase the burden and "costs of the United States". All of these points defeat the underlying goal and purpose of Congress when she passed ADA in 1990. [42 U.S.C. ¶ 12111 (2) (6) (8) & (9) also see i.e. *Matter of Wirth*, 298 A.D. 2d. 36 (Second Dep't) (2002); also see i.e. *Arnett* v *Kennedy*, 416

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[11] This Court made clear to distinguish Congressional power to pass statutes that are binding upon State's, compared to overriding the far stricter principle of abrogating the Eleventh Amendment.
" Even where the Constitution vest in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suites by private parties against unconsenting States" [*Seminole Tribe* v *Florida*, 517 U.S. 44, 72 (1996)]

"Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in action for money damages, as well as by private individuals in actions for injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908). [*Board of Trustees* v *Garrett*, 531 U.S. 356, 374 (2001)]

also see i.e. *Thompson* v *State of Colorado*, 278 F. 3d. 1020, 1034, n.11, (CA10) (2001) (en banc) " This Court expresses no opinion as to the constitutional power of Congress to enact Title II of the ADA. Thus, *Ex Parte Young* suits seeking prospective injunctive relief and suits against entities not protected by the Eleventh Amendment are not prohibited by this opinion."

Similarly, this Court made clear in 1987, that " allowing a seaman by passage of Jones Act to sue in federal court is not the equivalent to "'abrogate the Eleventh Amendment'" as the employer may be different than the State". [*Welch* v *Texas Highway and Public Transp.* 483 U.S. 468, at 475-476 (1987)]

[12] See i.e. *Olmstead* v *L.C.* 527 U. S. 581, 597 (1999)

U.S. 134, at 194-195, (1974) concurring in part/ dissenting White J. citing *Lefkowitz* v *Turley*, 414 U.S.70, 83-84 (1973)].

(d) *Petitioner has carried his burden to support a deprivation of due process*

Reversals by the referee and staff counsel were made in court with respect to: (i) petitioner being allowed an adjournment to cross-examine the surprise witness; (ii) having his written testimony substitute for his oral testimony on the condition that all exhibits relied upon are admissible; (iii) Chovnick's affidavits being admitted to prove that the oral retainer agreement was $ 300.00 per hour which was relied upon by petitioner. Referee Feldman and staff counsel Bratton concluded that Chovnick's testimony will not be admissible for any purpose other than "character". The record proves that they have reversed themselves on this evidentiary point on three occasions. *[supra*, page 9 ft. note 4]. These turnarounds are a far cry from any "special "special accommodations" being provided for by the referee as the decision of May 16, 2002 claims. [see page 8 *App. B at 12a*]. Petitioner has carried his burden to demonstrate a failure by respondents to constitutionally and statutorily abide by the ADA. [see *Garcia* v *S.U.N.Y.* 280 F. 3d 98, 109-110, (2nd Cir. 2001) citing *Bd. of Tr. Of Univ. of Alabama* v *Garrett*, 531 U.S. 356, 121 S. Ct. 955, at 963-964 (2001) & *Cleburne* v *Cleburne Living Center Inc.*, 473 U.S. 432, 442-47 (1985)]. [13]

(e) *The finding by the Appellate Division of petitioner " inadequately handling" the Levine matter in 1992-93, is diametrically inconsistent with their prior finding that petitioner did not have a neurological impairment as of 1985. It strongly supports a qualified disability under the laymen's*

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[13] As such, these rulings are in "conflict with federal law". It is pre-empted by the Supremecy Clause. [see i.e. *Cipollone supra*, 506 U.S. 504, 516, also see i.e. *Picquard* v *City of East Peoria*, 887 F. Supp. 1106, 1127 (C.D. Ill.) (1996) citing *Hines* v *Davidowitz*, 312 U.S.52, 67 (1941) further citations omitted)].

" perception" doctrine.

The Appellate Division has an apparent inconsistency on the face of its written decision. On one hand, they find that petitioner was neurologically capable and or recovered as of 1985. [*App.B. at 12a].* On the other hand, they find that in 1993, petitioner could not "adequately handle such litigation." [re:# 97-500- see *App. D. at 33a*].

"Impairment as perceived" is addressed by many courts. [see i.e. *Partlow* v *Runyon*, 826 F. Supp. 40, 44 (D.N.H. 1993) citing *Taylor* v *United States Postal Serv.*, 946 F. 2d 1214, 1218 (6th Cir. 1991); *seminal case, E.E. Black, Ltd.*, v *Marshall*, 497 F. Supp. 1088, 1100-1101 (D.Haw.) (1980) further citations omitted; *Partlow supra,* at 43 citing 29 C.F.R. ¶ 1613.702 (b)(1) supporting disability to include "physical disorder" related to the "neurological system."] No matter how accurate petitioner was in 1992, the state officials of NY will now rely on his failure to admit to his "inadequacy" as a basis for the prior admonition, and then use this altered evidentiary standard to help prove petitioner's current behavior and apply it to the present charge. [see Point III *infra*].

Point II (A) (ii)

Failure to exhaust State Administrative remedies precludes any Federal Court intervention by virtue of Younger and Burford abstentions.

Petitioner's reading of *NOPSI III* is that the sole reason the Court did not find the *Younger* abstention to apply was that " the Council's proceedings in the present case were *not judicial in nature*." [emphasis added, *NOPSI, III*, 491 U.S. 350, 370 (1989)]. Therefore, the city council hearings were "found " to be legislative." [*id.* at 370]. This is clearly not the case for either the administrative proceedings in *Hason* or the present matter. [see i.e. *Geiger* v *Jenkins*, 316 F. Supp. 370, [U.S. D.C. Ga.] (1970) affirmed pursuant to *Younger* v *Harris*, 401 U.S. 985 (1971);. also see i.e. *Semler* v *Dental Examiners*, 294 U.S.

608, 611 (1935); *Douglas* v *Noble*, 261 U.S. 165, 166 (1923) *doctors; & Middlesex County Ethics Comm.* v *Garden State Bar Assn.*, 457 U.S. 423 (1982), *attorneys*].

This Court in *NOPSI III* made clear that the two administrative proceedings that applied the *Younger* abstention principle beforehand were each "ongoing". [*NOPSI III supra* at 369 ft. note 4, citing *Ohio State Rights Comm'n.* v *Dayton Christian Schools*, 477 U.S. 619 (1986); & *Middlesex County Ethics supra*]. She stated that the *Younger* abstention doctrine would appear to apply if the administrative proceeding was "final". It was noted that abandoning the cases in midstream after a final administrative order was issued was "*never squarely faced*" by the Court. [*NOPSI III supra.* at 369 ft. note 4]. Conversely, it is well known that until the Court is faced with the issue head on, it cannot be made into law in a "*sub silentio* holding". [*Will* v *Michigan Dep't.* 491 U.S. 58, 63, n. 4 (1989)].

Burford and import of Exhaustion

Dr. Hason seeks monetary damages and injunctive relief. As such, the abstention principles of either *Younger* or *Alabama Comm'n* v *Southern R. Co.*, 341 U.S. 341 (1951), a by-product of *Burford*, are germane. This Court in *Alabama Comm'n.* noted that the plaintiffs failed to exhaust their state judicial remedies. [*id* at 348-349].

What is of legal import is to distinguish federal court abstention principles when the party seeking federal review had already started the state administrative process, compared to when the case was originally commenced in federal court. The *Hason* matter has similar yet distinguishable overtures to *England v Medical Examiners*, when this Court reviewed the complaint of chiropractors who claimed that the state statute was unconstitutional. This Court made certain to distinguish the plaintiffs in *England* with other cases that "involve[d] the possibility of unwarranted disruption of a state administrative process". [see *England* v *Medical Examiners*, 375 U.S. 411, at 415 ft. note 5, (1964) comparing *Burford* v *Sun Oil Co.*, 319 U.,S. 315 (1943); & *Alabama Public Services Commn. supra*, also cf. *McNeese* v *Board of Education*,

373 U.S. 668 (1963); and *Damico* v *California*, 389 U.S. 416 (1967) & *King* v *Smith*, 392 U.S. 309 (1968) each brought to federal court without any prior state proceeding].

Moreover, it is highly doubtful that Congress intended to override State sovereign immunity respecting the licensing of a professional, when the State provided an entire Appellate procedure for the review of the agency. Congress and this Court has made clear beforehand that internal remedies"bypasses" a private party's right to commence a private cause of action. [see i.e. *Middlesex County v Sea Clammers, 453 U.S. 1, at 19-21 (1981) also see Meghirg* v *KFC Western Inc*, 516 U.S. 479-, 487-488 (1996) citing *Sea Clammers*].

Younger and Burford warrants "outright dismissal," compared to the retention of jurisdiction that *England* provides. [see *Gibson* v *Berryhill*, 411 U.S. 564, 577 (1973); also see i.e. *NOPSI III*, 850 F. 2d. 1069, 1079 (CA5) (1988) re: "***hands off***" abstention doctrine allowing" the ultimate protection of the federal constitution"]. It therefore appears that once the state administrative body has issued a final order that is judicial in nature, the subsequent claim by the party who commenced the case in federal court is not "*sufficient to arrest the jurisdiction of this Court*." [*Osborn* v *Bank of U.S.* 9 Wheat 738, 820 (1824)]. The distinguishing characteristics in the manner which the Hason and present petition arrived before this Court, and the common questions concering the applicability of the ADA, suggests consolidating the two appeals. [Court rule 27(3); Supreme Court Practice, Stern, Gressman, Shapiro & Geller, 7th Edition 1993, ¶ 14.6 at page 580] . [14]

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[14] " An order limiting the grant of certiorari does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case." [*Piper Aircraft* v *Reyno*, 454 U.S. 235, 246-247, n. 12 (1981) citing i.e. *Redrup* v *New York*, 386 U.S. 767, 770 (1967) " The court originally limited review in these cases to certain particular questions... But we have concluded that the cases should be decided upon a common and controlling fundamental constitutional basis, without prejudice to the questions upon which

Point III

Power to review prior private admonition appears proper. Alteration of evidentiary principle in retroactive fashion in response to petitioner's argument that prior adomonition should be vacated, is a denial of First Amendment freedom of speech, and violates Article I Section 10 of the United States Constitution. The supervisional power of this Court appears warranted.

Petitioner incorporates by reference Point III B of the brief to reargue to the New York Court of Appeals dated October 9, 2002, together with petitioner's correspondence dated August 2, 2001.[see *App. "I" at 138a,* and petition to this Court # 97-500]. The mandatory directive for the "prompt" investigation of "rape" by the recipients of grants from Congress pursuant to the Spending Power, is not a "broad brush", nor a "blanket approach," and/or "yardstick" standard that a court could not enforce. [42 U.S.C. ¶ 5106g (7) (B) & 42 U.S.C. ¶ 5106(a) (b) (2) as set forth in 1992]. Rather, it was conditional and "identifies" the specific right well within the dimensions of the Court's prior precedent. [cf. i.e. *Blessing* v *Freestone,* 520 U.S. 329, 342, 343, 344,(1997)]. An intended beneficiary has standing to bring a private cause of action under 42 U.S.C. 1983, if Congress passed the statute under the Spending power. That clause was looked upon as a contract [*Pennhurst I,* 451 U.S. 1, 17 (1981); *Suter* v *Artist M.,* 503 U.S.347, 355 ft. note 8 citing Article I ¶ 8 cl. 1]. The State could decline the funds and be free of the contractual obligations. [*Golden State* v *City of Los Angeles,* 493 U.S. 103, 112 (1989)]. The statute was not amorphous but rather imposed a binding obligation, as the terms were mandatory and conditional. These are the rulings by this Court from *Maine v Thiboutot, to Pennhurst I; Golden State; Wright; Wilder; and Suter.* [see i.e. ¶123 & ¶'s 165-170 of complaint; i.e. *Wilder* v *Virginia Hospital,* 496 U.S. 498, 509-512 (1990); also see *Blessing* v *Freestone,* 520 U.S.329, 349-50, (1997) concurring opinions].

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review was originally granted." [*Redrup* v *New York,* 386 U.S. 767, 769-770 (1967)].

The fact that the statute may have a tangential effect on domestic relations no longer raised the discretionary abstention doctrine, as the mandatory divestment doctrine is limited to the decrees of alimony, custody, and divorce, in any federal proceeding. [*Ankenbrandt* v *Richards*, 504 U.S. 689, 703 (1992)]. This was the core of the July 8, 1992 complaint. [# 97-500; ¶123 & ¶'s 165-170 et. al of July 8, 1992 complaint]. A very recent decision rendered by this Court proves this final point. This Court made clear in 2000, that Congress in no fashion limited the statutory mandatory divestment to the diversity statute [28 U.S.C. 1332] when she passed legislation in the Violence Against Womens Act, of 1994. [*U.S.* v *Morrison*, 529 U.S. 598, 605, (2000) citing ¶ 40302, 108 Stat. 1941-1942; 42 U.S.C ¶ 13981]. As this Court stated, Congress specifically set forth that:

> "subsection (e)(4) further states that ¶ 13981 shall not be construed "to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." [*id.* 606-607].

42 U.S.C.¶ 13981 was not a diversity statute. Congress however recognized the ruling of *Ankenbrandt* and attempted to comply with the mandatory statutory divestment that this Court set forth in *Ankenbrandt*. The same truism applied in #97-500. The new divestment doctrine did apply to 42 U.S.C. ¶ 1983. It was not limited to diversity disputes. The District Court in *Levine* ignored *Ankenbrandt* and concluded that it was immaterial. [" *Ankenbrnadt*....held that the domestic relations exception to a federal district court's diversity jurisdiction over a tort claim for damages based on alleged sexual abuse. Since there is no complete jurisdiction between Levine and all of the defendant's here, *Ankenbrandt is clearly inapplicable*." *Levine* v *County of Westchester*, 828 F. Supp. 238, at 242 ft. note 3] This perception, that the new domestic relations divestment doctrine was limited to diversity disputes, was reiterated in 1995 in a separate proceeding. Divestment was properly not applied. However, the underlying basis was that *Ankenbrandt* was a diversity dispute, and since the plaintiff in Williams brought that case

to the attention of the federal court outside the arena of 28 USC 1332, the domestic relations exception doctrine was a non-issue. [see *Williams* v *Lambert*, 46 F. 3d 1275, 1284 (1995) the case is "before this Court on federal jurisdiction, not diversity"(*id.* at 1285)]

One of the major reasons for dismissing the July 8, 1992 complaint was limiting *Ankenbrandt* to diversity cases. This led to ambivalence in the change of the domestic relations exception doctrine from discretionary to divesment, which is the heart of petitioner's argument to support original subject matter jurisdiction pursuant to the legislation passed by Congress under CAPTA at that time. The Court could no longer use its discretion and avoid the statute passed by Congress as long as petitioner did not seek the orders of custody; alimony; or divorce, from the federal court. Therefore, *Ankenbrandt* was probative, regardless of the fact that it happened to be a diversity case. The core of original jurisidciton which was the creation of a federal right by Congress was ignored by the Court. The "supervisional" authority of this Court over the "principles of right and justice" is respectfully warranted. [see *Frazier* v *Heebe*, 482 U.S. 641, at 645-646 (1987), quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968); also see D.C. "28" at *App. T*] [15]

Petitioner has a constitutional right to argue in court that the prior admonition should no longer be used. To punish petitioner for raising the legal points established by the United States Supreme Court is a violation of a First Amendment right. [*Perry* v *Sindermann*, 408 U.S. 593, 597 (1972); *Wabaunsee County Kansas* v *Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Service, Inc.* v *City of Northlake*, 518 U.S. 712 (1996); *Keyishian* v *Board of Regents*, 385 U.S. 589, 605-606 (1967) further citations omitted].

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[15] Issue and claim preclusion barred any appeal beforehand. [see *App. U*]. The prior admonition is germane as a clean prior record is important for mitigation. [see i.e. *In Matter* of *Blum*; 2002 L.A. Daily Journal DAR, 6165; 2002 WL 1067225; 4 Cal. State Bar Court Reporter 403; citing *Hawes* v *State Bar of Cal.* 51 Cal. 3d 587, 596 (1990); *Chefsky* v *State Bar*, 36 Cal. 3d 116, 132 ft. note 10 (1984) mitigation for no prior discipline in past 10 years].

To link petitioner's arguments to vacate the prior admonition as a new evidentiary basis to support the present charge of conversion, by claiming that petitioner "rationalizes his conduct *as* he has done persistently in this case", [emphasis added *App. B at 13a*; and *App. D at 38a*] "alters" the principle of whether petitioner's reasoning was frivolous and or illegal on July 8, 1992. This is arguably a form of punishment that violates the *Ex Post Facto* law set forth by Article I Sec. 10. cl. 1 of the United States Constitution. [see *Ex Parte Garland*, 4 Wall. 333, 377-381 (1866) *Ex Post Facto* applies to civil matters; see *Carmel* v *Texas*, 529 U.S. 513, 521-542 (2000) –"alters the legal rules of evidence" in retroactive fashion found unconstitutional, at 521-522 et. al quoting *Calder* v *Bull*, 3 Dall. 386 (1798)] [16]. Reliance on prior admonition was improper. [*App. B & D*]

For these reasons, it is respectfully requested that this court use its "abstract power"and review the prior admonition. [*Messenger* v *Anderson*, 225 U.S. 436, at 444 (1912) see # 97-500 at "A76-77" also see *Ex Parte Garland*, 4 Wall. 333, 380-381 (1866)]. [17]

Conclusion

The petition for a writ of certiorari should be granted.

Dated: February 12, 2003

Respectfully submitted,
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S.R.@

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[16] Petitioner points out that 42 U.S.C. ¶ 1983 was different before the amendment of 1996. Therefore, petitioner's complaint adhered to the law as set forth in 1992. [*App. I*, also see 42 U.S.C. ¶ 12203 (a-c), and ¶ 12202].

[17] The instant petition is further submitted in response to the order to show cause of this Court dated August 5, 2002. [see i.e. *In Re Summers*, 323 U.S. 705, # 205 (1944); re: "D2331" at *App. V*].

APPENDIX

Appendix 1

The Constitution of the United States of America

Article IV Section 2: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

Article I ¶ 10: No State shall enter into any Treaty; Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pas any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

Amendment XI

The Judicial power of the United States shall not be considered to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

Amendment XIV:

Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.

NY Judiciary Law ¶ 90: Admission to and removal from practice by appellate division; character committees

(6): Before an attorney or counselor at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense.

Equal Opportunity for Individuals with Disabilities

42 U.S.C. ¶ 12101: Findings and purpose

(a) Findings

The Congress finds that -----

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older; ...

(8) the Nations' proper goals regarding individuals with disabilities is to assure equality of opportunity, full participation, independent living and economic self-sufficiency for such individuals.

(b): Purpose

It is the purpose of this chapter-----

(2) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

(1) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities

(2) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(3) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. ¶ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees employee compensation, job training, and other terms, conditions, and privileges of employment....

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection of this section shall include medical examinations and inquiries.

(2) Preemployment
(A) Prohibits examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable injury

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if ---

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that ---

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request and

(C) the results of such examination are used solely in accordance with this Chapter.

(4) Examination and inquiry

(B)Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries in the ability of an employee to perform job related functions.

42 U.S.C. ¶ 12131. Definitions

As used in this subchapter;

(1) Public Entity

The term "public entity" means----

(A) any State or local government
(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services of the participation in programs or activities provided by the public entity.

42 U.S.C. ¶ 12132 Discrimination

Subject to the provision of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C ¶ 12202. State immunity

A state shall not be immune under the eleventh amendment to the Constitution of the United States form an action in Federal or state court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. ¶ 12203. Prohibition against retaliation

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(C) Remedies and procedures

The remedies and procedures available under sections 12217, 12133 and 12188 of this Title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

42 U.S.C ¶ 1983 : Before 1996;

¶ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be the statute of the District of Columbia.

Appendix 1

42 U.S.C. ¶ 1983 : As Amended October 19, 1996

¶ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be the statute of the District of Columbia.

Lawyers Code of Professional Responsibility

D.R. 9-102: Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Maintenance of Bank Accounts; Recordkeeping; Examination of Records.

(b)(4) Funds belonging in part to a client or third person and in part presently potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law form may be removed when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved

Appendix 1

22 N.Y.C.R.R. ¶ 603.4 Appointment of Disciplinary Agencies; Commencement of Investigation of Misconduct; Complaints; Procedure in Certain Cases

(3)(e) (1) An attorney who is subject of an investigation, or of charges by the Departmental Disciplinary Committee of professional misconduct, or who is the subject of a disciplinary proceedings pending in this court against whom a petition has been filed pursuant to this section, or upon whom a notice has been served pursuant to section 603.3(b) of this Part, may be suspended from practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

(i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct

22 NYCRR ¶ 605.12 Conduct of Referee Proceedings

(p) Determinations

(1) *Post-Testimony Procedure.* At the conclusion of the testimony and following the presentation of oral arguments, the Referee shall determine whether an inquiry as to sanction is required and shall, before the commencement of the inquiry, set forth on the record or in writing the charges that were to be sustained. The inquiry may commence immediately upon the conclusion of the oral arguments, but in no event later than 7 days from the conclusion of the oral arguments whether any charges against the Respondent are to be sustained.

Appendix 1

22 NYCRR ¶ 605.16 Reopening of Record

(a) Reopening on Application of Respondent

(1) *Application to Reopen.* No application to reopen a proceeding shall be granted except upon the application of the Respondent prior to the filing by the Referee of the Report and Recommendation or Hearing Panel of its Determination and only upon good cause shown. Such application shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceedings, and shall be filed with the Office of Chief Counsel. A copy of such application shall be served by the Respondent upon all other parties.

(2) *Responses.* Within five days following the receipt of such application, and other Party may file with the Office of Chief counsel an answer thereto, and in default thereof shall be deemed to have waived any objection to the granting of such application.

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court
held at Court of Appeals Hall
in the City of Albany
on the 19th day
of November, 2002

PRESENT, Hon. Judith S. Kaye, *Chief Judge, Presiding*

Mo. No. 1154
In the Matter of Richard Stevens
(admitted as Richard Zelma),
an attorney and counselor-at-law:

Departmental Disciplinary Committee
for the First Judicial Department,

Respondent,

Richard Stevens, Esq.,

Appellant.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court
held at Court of Appeals Hall
in the City of Albany
on the 10th day
of September, 2002

PRESENT, Hon. Judith S. Kaye, *Chief Judge, Presiding*

Mo. No. 746
In the Matter of Richard Stevens
(admitted as Richard Zelma),
an attorney and counselor-at-law:

Departmental Disciplinary Committee
for the First Judicial Department,

Respondent,

Richard Stevens, Esq.,

Appellant.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Stuart M. Cohen
Clerk of the Court

APPENDIX B

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the Court of New York on May 16, 2002.

Present: Hon. Milton L. Williams, Presiding Justice
Peter Tom
Richard T. Andrias
Alfred D. Lerner
David B. Saxe, Justices

Filed
May 16, 2002

In the Matter of Richard Stevens
(admitted as Richard Zelma),
an attorney and counselor-at-law:

Departmental Disciplinary Committee
for the First Judicial Department,
Petitioner,

Richard Stevens, Esq.,
Respondent.

M-701
M-139
M-1034

An unpublished order of this Court having been entered on December 11, 2000 (M-7203), appointing a Referee to conduct a hearing in the above-referenced proceeding and to file a report pursuant to Section 605.12(f) of the Rules of the Court on formal charges against respondent (who, as Richard Zelma, was admitted to the practice as an attorney and counselor-at-law in the State of New York at a Term of the Appellate Division for the First Judicial Department on July 26, 1982),

And the Departmental Disciplinary Committee, by Thomas J. Cahill, its Chief Counsel (Andral N. Bratton, of counsel), having presented a petition to this Court on

APPENDIX B

February 26, 2002 seeking an order pursuant to 22 NYCRR 603. 4 confirming the Determination of the Hearing Panel, which confirmed the Referee's findings of fact, conclusions of law and recommended sanction of disbarment; disbarring respondent from the practice of law; and directing respondent, pursuant to Judiciary Law §90(6-a} (a), to make monetary restitution in the amount of $115,000,

And respondent, pro se, having interposed a brief, inter alia, in opposition to the motion; and having cross-moved for, inter alia, denial of the petition,

Now, upon reading and filing the papers with respect to the petition and the cross-motion; and due deliberation having been had thereon, and upon the Opinion Per Curiam filed herein, it is unanimously

Ordered that the petition is granted and the Determination of the Hearing Panel, which confirmed the Referee's findings of fact, conclusions of law and recommended sanction, is confirmed; and respondent is disbarred and his name is stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof; and it is further

Ordered that respondent is commanded to desist and refrain from the practice of law in any form, either as principal or agent, clerk or employee of another; that respondent is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority; that respondent is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, effective the date hereof. Respondent is directed to fully comply with the provisions of Title 22, Section 603.13, of the Rules of this Court, a copy of which is annexed hereto and made a part hereof, and it is further

Ordered that respondent is directed, pursuant to

APPENDIX B

Judiciary Law §90 (6-a) (a), to make monetary restitution in the amount of $115,000 to Laurie Thompson, and it is further

Ordered that respondent's cross-motion is granted only to the extent of deeming withdrawn this Court's sua sponte motion (M-701) to vacate respondent's name change.

Enter:

Catherine O'Hagen Wolfe

Clerk

Appellate Division Supreme Court First Department
State of New York

CATHERINE O'HAGEN WOLFE, Clerk of the Appellate Division of the Supreme Court, First Judicial Department do hereby certify that I have compared this copy with the original thereof in said office on 5-16-2002 and that the same is a correct transcript thereof and the whole of said original.

APPENDIX B

SUPREME COURT, APPELLATE DIVISION

May 16, 2002

First Judicial Department, February 2002

Milton L. Williams, Presiding Justice
Peter Tom
Richard T. Andrias
Alfred D. Lerner
David B. Saxe, Justices

In the Matter of Richard Stevens (admitted as Richard Zelma),	
n attorney and counselor-at-law:	M-701
Departmental Disciplinary Committee	M-139
for the First Judicial Department,	M-1034
Petitioner,	
Richard Stevens, Esq.,	
Respondent.	

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. By an unpublished order of this Court entered on December 11, 2000 (M-7203), a Referee was appointed to conduct a hearing and file a report on formal charges pursuant to Section 605.12(f) of the Rules of the Court.

Andral N. Bratton, of counsel (Thomas J. Cahill, Chief Counsel) for petitioner.

Respondent, pro se.

APPENDIX B

Motion No. 701 - February 15, 2001
Motion Nos. 139, 1034 - February 26, 2002

In the Matter of Richard Stevens (admitted as Richard Zelma), an Attorney

PER CURIAM

Respondent, Richard Stevens, was admitted to the practice of law in this Department on July 26, 1982, as Richard Zelma. By an order dated May 23, 2000, this Court granted respondent's petition to change his name on the roll of attorneys and counsellors-at-law from Richard Zelma to Richard Stevens. At all times relevant, respondent maintained an office for the practice of law within this Department. Respondent was also admitted in California.

By order dated February 15, 2001 [M-701]this Court, sua sponte, directed respondent to show cause why we should not vacate our order granting him permission to change his name on the grounds that he recently reverted to his original name in papers filed before this Court in connection with Matter of the Subpoena of Richard S. Zelma. That sua sponte motion has been held in abeyance pending the conclusion of this disciplinary proceeding.

By Notice and Statement of Charges served on or about February 26, 2001, and supplemental charges served during the evidentiary hearing, respondent was charged with intentional conversion of $115,000 of a client's funds held in escrow, misrepresentations to a bonding company, gross misuse of his client's escrow account, and intentionally prejudicing his client, all in violation of Disciplinary Rules 1-102 (A) (4) and (7), 7-101 (A) (3), and 9-102 (A), (B), (D) and (E).

APPENDIX B

By answer dated April 5, 2001, respondent essentially admitted that he wrote checks to "cash" and made ATM transfers on his escrow account, but otherwise denied the allegations. During the evidentiary hearing, respondent did not contest that he commingled funds and failed to maintain proper bookkeeping records of his escrow account.

The Special Referee held hearings on June 21, 25 and 27, 2001, at which respondent appeared pro se. A pre-hearing stipulation dated April 19, 2001, executed by the Committee and respondent's then counsel was submitted. The Referee sustained all eight charges against respondent. Following the June 27th hearing on sanction, the Referee reserved decision pending receipt of further written submissions from the parties. On or about July 23, 2001, respondent filed a motion to reopen the hearing. In a report dated August 25, 2001, the Referee denied respondent's motion to reopen and recommended that he be disbarred.

On October 29, 2001, a Hearing Panel convened at which counsel for the Committee appeared; respondent submitted a statement of facts and brief instead. In a report dated November 6, 2001, the Hearing Panel confirmed the Referee's findings of fact and recommendation of disbarment. Respondent's requests for reconsideration on November 15 and 26, 2001 were denied by the Panel in a Supplemental Report dated November 28, 2001.

All of the allegations of misconduct relate to respondent's representation of the plaintiff Laurie Thompson in connection with proceedings following a non-jury trial in Thompson v 490 West End Apts. Corp., et al., and the appeal from the 1997 judgment. The trial court had declared, among other things, that Thompson was not the owner of certain "unsold" shares of a cooperative apartment she had been subletting to doctors, and directed her to pay defendant's counsel fees in the sum of $95,000. In

APPENDIX B

December 1996, eight months before entry of judgment, respondent, who knew Thompson from her having notarized documents for him, offered to handle Thompson's appeal if that should become necessary. Thompson testified that respondent stated that she would be his "only" client and he would devote all his energy to the matter.

Thereafter, respondent introduced Thompson to an attorney, who, because of alleged expertise in real estate matters, would act with respondent as co-counsel. Although there was never a written retainer agreement, Thompson testified that respondent had agreed he would charge $125 an hour. Respondent claimed, in conflict with some documentary evidence, that he agreed to an hourly rate of $300. Throughout 1997, at respondent's direction Thompson paid him, his co-counsel and his brother, who is also an attorney, at least $142,000 in legal fees, including $92,000 directly to respondent, as well as $4,205.55, for appeal printing costs. Except for the $10,000 paid to his brother, not one payment was made pursuant to a bill or statement; rather, Thompson wrote checks totaling $133,000 in response to respondent's oral requests without him providing an accounting.

Respondent's misconduct arose in connection with a further $115,000 he was holding in escrow on behalf of Thompson, separate from the $142,000 in legal fees. Since the judgment in the sublet matter directed Thompson to pay $95,000 to opposing counsel, she gave respondent an additional $115,000 as collateral for an appeal bond to pay in the event she lost her appeal. Respondent deposited this amount in his bank account designated "Richard Zelma IOLA Account" (the "escrow account") which already held approximately $50,000 in legal fees already paid by Thompson. Hence, the Referee found, which respondent did not dispute, that he commingled his own money with that of

a client in violation of DR 9-102(A).

By letter dated August 6, 1997, respondent advised the bonding company, Fidelity and Deposit Company of Maryland (Fidelity) that he was holding $114,000 (sic) in his escrow account to indemnify Fidelity for any loss incurred in connection with the appeal Bond "up to the amount of $85,000." He also represented that the funds "will not be released to anyone else, including substitute counsel, without first receiving from [Fidelity] written approval to do so." It is undisputed that from August 7, 1997 to August 1998, respondent completely depleted Thompson's money from his escrow account. Even after this Court, by a decision dated July 16, 1998, affirmed the judgment directing Thompson to pay opposing counsel's fees of $95,000 plus interest and costs (Thompson v 490 West End Apts. Corp., 252 AD2d 430, lv denied 92 NY2d 814), respondent proceeded to make cash withdrawals leaving a balance of $45.23 as of August 13, 1998.

Although respondent claimed that Thompson consented to such withdrawals as payment for legal fees owed, Thompson denied such consent. Thompson and her son testified that at some point, after the fact, respondent admitted to them that he had taken "$40,000" from the escrow account and told them that he could be "imprisoned or disbarred" for such an act. Thompson testified further that she was never told by respondent of any additional depletion of escrow funds, rather, she ultimately learned of it from the bonding company. She also testified that she repeatedly asked respondent for an accounting of legal fees she had already paid to him and his co-counsel. Tellingly, respondent's own letters dated November 10, 1997 and February 6, 1998, which allegedly set forth fees owing, did not credit Thompson for the fees she had already paid to him or any sums he had taken (and was continuing to take) from

the escrow account.

Based upon respondent's answer to the charges, the pre-hearing stipulation, and respondent's statements on the record, the Referee found that the material facts with respect to charges two through eight were admitted and undisputed. The only material fact in dispute was whether, at the times respondent withdrew his client's $115,000 from his escrow account, he had client's full knowledge and consent or did he intentionally convert client funds in violation of DR 1-102 (A) (4). The Referee credited the testimony of Thompson and her son, together with respondent's own billing letters and records as well as his selected portions of his 1997 and 1998 tax returns, which the Referee found, cast relevant doubt on respondent's general credibility, and found that respondent violated this Rule.

As to the bonding company, respondent claimed he had taken the $115,000 as his "legal fee" with Thompson's consent. However, the Referee found that other than respondent's "totally self-serving uncorroborated and inconsistent statements, there was no evidence of this and concluded that respondent's withdrawal of the $115,000 was "surreptitious". Furthermore, respondent advised Fidelity to look to Thompson to recover the $115,000 (since it was liable for $95,000 plus interest), and respondent "gratuitously and inconsistently offered to assign any outstanding claim he may have against Thompson to Fidelity."

Accordingly, the Referee sustained all eight charges: intentional conversion of client funds in violation of DR 1-102 (A) (4); false representations to the bonding company that he had his client's consent and that he would hold the money to indemnify Fidelity, in further violation of DR 1-102 (A) (4); the sending of self-serving and self-justifying letters to Fidelity at his client's expense thereby intentionally prejudicing or damaging a client in violation of DR 7-101 (A) (3); failing to preserve the identity of his client funds in

violation of DR 9-102 (A) and (B); numerous cash and ATM withdrawals from his escrow account in violation of DR 9-102(E); commingling of his funds with client funds and failure to maintain required bookkeeping records of his escrow account in violation of DR 9-102 (A) and (D); and that respondent engaged in conduct that adversely reflects on his fitness as a lawyer in violation of DR 1-102 (A) (7).

In mitigation, respondent's brother testified to a serious hit-and-run car accident that left respondent in a month-long coma in January 1984 and required a period of physical rehabilitation. However, since respondent worked in a legal capacity since 1985 and there was no suggestion of current incapacity, the Referee found no causal connection between his 1984 accident and his 1997-98 misconduct. Respondent also offered an affidavit of an attorney attesting to his honest character.

Although the Referee made special accommodations so that respondent's co-counsel could testify on respondent's behalf, he did not show up at the hearing. Rather, respondent attempted to submit his co-counsel's affidavit after the hearing had concluded. While the Referee agreed to keep the hearing open to accept affidavits as to character only, co-counsel's affidavit dealt almost entirely with the merits except for two sentences which purportedly went to character. Further, in his post-hearing submission, respondent relied on the affidavit for his proposed findings; and also moved to reopen the record to receive co-counsel's affidavit which had been rejected. Respondent also tried to submit an affidavit from co-counsel to the Hearing Panel. In its supplemental report, the Panel states that it "considered" this affidavit but still declined to reopen the record.

Regarding sanction, the Referee summarized respondent's misconduct noting that he "enriched himself at the expense of his client"; that she was "ultimately required

to repay Fidelity out of her pocket for the funds taken by respondent intended to secure Fidelity"; and that not only had respondent falsely claimed he had Thompson's consent to remove the funds, but he also erroneously argued that he did not need such consent. In recommending disbarment as the only appropriate sanction, the Referee found that respondent "violated virtually every provision of the Code of Professional Responsibility pertaining to the proper handling of attorney escrow accounts." Except for apologizing for his violation of DR 9-102, the Referee determined that respondent expressed no remorse and was "unwilling or unable to acknowledge his responsibility for his actions." Detailing respondent's extensive motion practice before the Referee and this Court, the Referee commented that "respondent has made it an art to avoid or delay having to confront, accept, or recognize the fact that he may have done something wrong." Further, he noted that respondent was previously admonished by the Committee in 1998 for frivolous litigation and failure to recognize inability to adequately handle such litigation that involved a Federal civil rights action in which a $10,000 fine was imposed against respondent pursuant to Rule 11 of the Federal Rules of Civil Procedure. The Referee rejected respondent's contention that this admonition should not be considered in light of recent court decisions which justify what he did in the Federal case, commenting that respondent "rationalizes his conduct as he has done persistently in this case."

Finding that no "extraordinary mitigation" existed at bar to depart from this Court's policy of disbarring attorneys who intentionally misappropriate funds (see, e.g., Matter of Tate, 258 AD2d 120), the Referee specifically "considered and rejected" the alternative of suspension concluding that respondent is "a willful, deceitful and manipulative individual who has shown himself to be unwilling to accept

APPENDIX B

responsibility for his actions, and who seeks to avoid or delay the consequences of his actions." In view of his "pattern of serious professional misconduct the lack of any relevant factors in mitigation, and his inability to recognize the seriousness of his misconduct," the Referee recommended disbarment and further recommended that, pursuant to Judiciary Law § 90 (6-a), respondent be directed to make monetary restitution of $115,000 to Ms. Thompson or, if appropriate, the Lawyers' Fund for Client Protection.

The Hearing Panel considered respondent's 50-page memorandum submitted in lieu of oral argument and unanimously confirmed the Referee's report including the recommendation of disbarment. The Panel's decision notes that, on October 22, 2001 (a week before the hearing before the Panel), respondent filed a motion to "expand the record" to include additional affidavits and other documents, to change the hearing date, and asked the Panel to "disaffirm the findings and or dismiss the charges, and or remand to the matter (sic) for a new trial that will be heard by a second referee." The Panel denied this motion.

The Committee now asks this Court to confirm the Hearing Panel's determination confirming the Referee's report, to disbar respondent and to direct that respondent make restitution, pursuant to Judiciary Law § 90(6-a), in the amount of $115,000 to Ms. Thompson or, if appropriate, the Lawyers' Fund for Client Protection. In support of its petition, the Committee maintains that where, as here, an attorney deliberately misappropriates funds, he is presumptively unfit to practice law (Matter of Mulrow, 241 AD2d 7), particularly where mitigation is virtually non-existent.

By cross-motion dated February 22, 2002, respondent raises 14 "points" and asks this Court to, inter alia: 1) deny the Committee's motion to confirm; 2) disaffirm the findings

APPENDIX B

of the Referee and remand for a new Referee "requiring independent corroboration"; 3) reverse and/or set aside the Referee's and Hearing Panel's recommendations; 4) enlarge the record to include all exhibits that were excluded by the Referee and that were attached to his motion to reopen; 5) order that the administrative proceedings have not been properly exhausted and, as such the petition is untimely and must be denied; 6) vacate the prior letter of admonition and this Court's sua sponte motion regarding his name change; 7) "exclude any and all further reference to Ms. Thompson's son; and 8) award respondent costs and attorneys fees expended on his behalf. Every contention raised by respondent was considered and rejected by the Referee and Hearing Panel in their determinations. Respondent's 14 points can be summarized as follows: Thompson and her son were not credible and, in fact, committed perjury, and it was in error for the Referee to exclude his exhibits named "S1 through S41" (which have been provided to this Court for review).

However, contrary to respondent's claims, is the fact that the Referee went to great lengths to explain that his credibility determination in favor of Thompson and against respondent was based on more than just the fact that he did not believe respondent's version of events. Indeed, he also relied on the documentary evidence in the record, including respondent's own correspondence and "billing" statements, in construing the issue of credibility against respondent. Moreover, the Hearing Panel made similar findings of credibility by confirming the Referee's report and, the evidence shows that respondent withdrew his client's funds from the escrow account without authority. Nor was there any evidence supporting his defenses that Thompson consented, either explicitly or impliedly, to his use of the money, that he had an "account stated" and a retaining lien,

and that he was entitled to self-help. Thus, a review of the record establishes that there is no reason to disturb these findings.

Nor did the Referee and Hearing Panel err in excluding or not considering further respondent's documents "S1 through S41" some of which he attempted to submit after the close of the Referee's hearing. While Exhibit S1 was respondent's answer to Thompson's initial complaint to the DDC, the remainder of the documents were related to Thompson's appeal or correspondence respondent had sent her. Since they were not material to the central issue of Thompson's knowledge and consent to respondent's conversion, they were "irrelevant", "self-serving" or "unauthenticated", and properly excluded from the record. Furthermore, respondent's assertion that there is insufficient evidence to support a finding that he was guilty of all eight charges is incorrect and illogical where he previously admitted to some of the misconduct charged. Nor is there merit to respondent's assertion that the administrative proceedings have not been exhausted and "may still be pending" because a motion he filed on December 7, 2001 asking the Hearing Panel to reconsider its determination or to remand the case back to the Referee has not yet been decided. Inasmuch as the Panel completed its work with the issuance of its report, reconsideration is not appropriate where the next step is for this Court to review the proceedings (22 NYCRR 605.14[g], 605.15[e]).

A review of respondent's exhaustive and often difficult to understand filings reveals that he is still unaware of the seriousness of his misconduct and believes that he has done nothing wrong. Consequently, in light of respondent's intentional conversion of client funds entrusted to him as an attorney, his pattern of additional misuse of his escrow account, his lack of remorse and any real offer of mitigation

and his prior admonition, we impose the sanction of disbarment (see, Matter of Pitts, 205 AD2d 110; Matter of Erdheim, 191 AD2d 105, appeal dismissed 82 NY2d 916). Furthermore, since there has been a finding of willful misappropriation, respondent is directed to make restitution pursuant to Judiciary Law § 90(6-a)(a) in the amount of $115,000 to Laurie Thompson (see, Matter of Israel, 230 AD2d 293).

Accordingly, the Committee's petition (M-139) to confirm the Hearing Panel's determination confirming the Referee's report in its entirety, to disbar respondent from the practice of law, and to direct respondent, pursuant to Judiciary Law § 90(6-a)(a), to make monetary restitution in the amount of $115,000 to his client should be granted. Respondent's cross-motion (M-1034) for, inter alia, disaffirmance of the reports by the Referee and Hearing Panel should be denied and this Court's sua sponte motion (M-701) to vacate respondent's name change should be withdrawn.

All concur. Order filed.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

In the Matter of Richard S. Stevens (Zelma), Esq.
an Attorney and Counselor-at-law

Before a Hearing Panel
Consisting of:
Lisa E. Davis, Esq.
Beatrice S. Frank, Esq. Chair
Charles A. Gibson

Departmental Disciplinary Committee
for the First Judicial Department

Petitioner

Richard S. Stevens (Zelma), Esq.

Respondent

PANEL'S RESPONSE TO RESPONDENT'S SUBMISSION DATED November 15, 2001

The Panel received a submission from the Respondent dated November 15, 2001 in which he claims that the Panel's Determination, dated November 6, 2001, fails to discuss Respondent's motion to reopen the hearing. However, in the third full paragraph of the second page of its Determination, the Panel noted that it had considered Respondent's motion dated October 22, 2001, and that it denied the motion.

The members of the Panel have considered Respondent's submission, including the additional affidavit of Stanley Chovnick. and unanimously affirm the Panel's denial of the motion.

Dated: November 28, 2001
New York, New York

Beatrice S. Frank, Panel chair

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FIRST JUDICIAL DEPARTMENT

In the Matter of Richard S. Stevens (Zelma), Esq., an Attorney and Counselor-at-law

Departmental Disciplinary Committee for the First Judicial Department,

Petitioner.

Before a Hearing Panel Consisting of:
Lisa E. Davis
Beatrice S. Frank, Esq., Chair
Charles A. Gibson

Richard S. Stevens (Zelma), Esq.,

Respondent.

DETERMINATION OF HEARING PANEL

Pursuant to 22 NYCRR Section 605.12. the Departmental Disciplinary Committee (the "Committee" filed a Notice of Charges on January 16, 2001 alleging that Richard Zelma whose name was changed to Richard S. Stevens, Esq. on May 23, 2000 ("Respondent") had committed six violations of the Code of Professional Responsibility; Part 1200, 22NYCRR (the "Code"). Specifically, the Notice of Charges alleged two counts of a violation of Disciplinary Rule 1-102(A)4, one count of a violation of Disciplinary Rule 7-101(A)3, one count of a violation of Disciplinary Rule 9-102(A) and (B), one count of a violation of Disciplinary Rule 9-102(E) and one count of a violation of Disciplinary Rule 1-102(A)7.

The Committee supplemented the charges during the hearing to add two additional counts: i) one charge of co-mingling client funds with Respondent's own funds in

violation of Disciplinary Rule 9-102(A) and an additional count of failing to maintain required bookkeeping records pertaining to an escrow account, in violation of Disciplinary Rule 9-102(D).

The Appellate Division, First Department, appointed Justin N. Feldman, Esq. as Referee to conduct a hearing to evaluate the charges, consider evidence in mitigation or aggravation, if and to recommend the appropriate sanction to be imposed upon Respondent. Hearings were held on June 21, 2001 and June 25th and 27th, 2001. Pursuant to NYCRR Section 605.14A, this Panel was assigned to review the Report and Recommendation of the Referee dated August 25. 2001.

The Panel has reviewed the original and supplemental Notice of Charges and supporting documents, the transcripts of the Referee's hearing, the Referee's Report and Recommendations. Respondent's numerous submissions in opposition, including a motion to re-open the record which was denied by the Referee, and a 103 page memorandum of law dated October 23. 2001.

On October 22. 2001, Respondent moved to "expand the record" to include additional affidavits and other documents, change the hearing date and asked that the Panel "disaffirm the findings and or dismiss the charges and or remand to the matter (sic) for a new trial that will be heard by a second referee." The Panel denies this motion.

On October 29, 2001, the Panel heard oral argument by the staff attorney for the Committee. Respondent did not appear, but submitted a 50 page memorandum of law dated, October 29, 2001, in lieu of oral argument. The Panel considered this memorandum of law as well.

After consideration of all of the foregoing, the Panel unanimously affirms the Referee's Report sustaining all of the charges, and concurs in his recommendation that

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Respondent should be disbarred.

Dated: November 6, 2001,
New York, New York

s/ Beatrice S. Frank, Panel Chair

APPENDIX D

BEFORE THE DEPARTMENTAL DISCIPLINARY COMMITTEE OF THE APPELLATE DIVISION OF THE SUPREME COURT STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

In the Matter of the Application
Richard S. Zelma, Esq.
name changed to
Richard Stevens May 23, 2000

Docket No: RP 32/2000
Before:
Justin N. Feldman, Esq.
Referee

REFEREE'S REPORT AND RECOMMENDATION

Preliminary Statement

An unpublished order of the Appellate Division, first Department, dated December 11, 2000, (M - 7203) appointed me Referee to conduct a hearing and file a report in this matter as provided in Part 605 of the Rules of the Court.

The Notice of Charges dated January 16,2001, alleged six violations of the Code of Professional Responsibility; Part 1200, 22 N.Y.C.R.R. (the "Code") i.e. intentional conversion of client funds in violation of DR 1-102 (A) (4), (Count one); making false representations in further violation of DR 1-102 (A) (4), (Count Two); intentionally prejudicing or damaging a client during the course of professional relationship, in violation of DR 7-101(A) (3), (Count Three); failing to preserve the identity of a client's funds, in violation of DR's 9-102 (A) and (B), (Count four); making case and ATM withdrawals from an escrow account, in violation of

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DR-9-102(E), (Count Five); and, conduct which adversely reflects upon his fitness to practice law, in violation of DR 1-102 (A) (7), (Count Six). As provided by 22 N.Y.C.R.R.¶ 605.11 (f), the charges were supplemented during the hearing, to allege commingling, in violation of DR 9-102 (A) (Count Seven), and failing to maintain required bookkeeping records, in violation of DR 9-102 (D) (Count Eight), see: Referee's Exhibit 7.

Respondent was admitted to the bar by the Appellate Division, First Department as Richard S. Zelma on July 26, 1982, and maintains an office for the practice of law as 221 West 82nd Street, New York, New York, 10024. He changed his name to Richard Stevens, effective May 23, 2000.[1]

After a series of delays, [2] the hearing commenced on June 21, 2001, and concluded on June 27, 2001. Andral N. Bratton, Esq. appeared on behalf of Committee Staff. Respondent appeared pro se, after counsel who had acted for him was relieved.[3]

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[1] All the acts complained of and many of the documents in evidence antedate the respondent's change of name. Hence the two names and "respondent" refer to the same person. He is also a member of the California Bar.

[2] For a history of delays, see TR 5-10, and Referee exhibits 2-5, and 9.

[3] Counsel asked to be relieved, and was relieved by me over respondent's objection in a pre-hearing motion after counsel was accused by respondent, in an ex parte submission, of various ethical violations. This ruling was sustained by the Court which ordered a three week adjournment for him to obtain new counsel. (Referee's Exhibit's 8 & 9) Respondent's brother, George Zelma, Esq. was called as a witness for the

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The three days of hearing on which evidence was presented both as to the charges and possible sanctions, concluded on June 27, 2001. After the parties' submitted their proposed findings and conclusions, the time for which was extended at respondent's request to July 18, 2001, respondent, on July 23, 2001 moved pursuant to 22 N.Y.C.R.R. ¶ 605.16, to reopen the record to receive in evidence the affidavit of Stanley Chovnick of June 27, 2001 and a letter written by him by a representative of the bonding company.

For the reasons stated below, respondent's application to reopen the record is denied.

Sua sponte however, the record is reopened to receive in evidence as Referee's Exhibit 12 respondent's letter to me dated August 2, 2001, and as Referee's Exhibit 13, a letter addressed to the Court dated January 31, 2001 which respondent marked as S-38 with his post hearing submission.; see Motion to Reopen, *infra*

For all of the reasons set forth below and pursuant to 22 N.Y.C.R.R.¶ 605.13 (q), I sustain all eight (8) Counts against respondent, and recommend that the respondent be disbarred.

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respondent on the second day of the hearing, June 25,2001. At the conclusion of this testimony, in which he stated inter alia that he had no knowledge of the proceeding against the respondent until called earlier that morning, (TR 293), respondent requested that his brother be permitted to "second seat" him "for one hour". George Zelma refused the opportunity to be co-counsel, but said he would act as respondent's assistant. I permitted that. In fact Mr. Zelma sat by respondent's side the rest of that day and on the next day of the hearing, June 27, 2001, and testified in the sanction part of the hearing. T:. 481 et. Seq.

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FACTS

All the allegations of respondent's misconduct relate to his representation of Laurie Thompson ("Thompson") in connection with proceedings following a non-jury trial before Judge Edward Lehner in Thompson v 490 West End Ave. Apartments Co.. et. al (Sup. Ct. N.Y. Index No. 130665/94), and the appeal from the judgment entered on August 13, 1997. Justice Lehner had declared inter alia that Ms. Thompson was not the owner of certain "unsold" shares of a cooperative apartment she had been subletting to doctors, and directed Thompson to pay defendant's counsel's fees in the amount of $ 95,000. (TR. 64-69)

Ms. Thompson, a "professional researcher and genealogist", (TR 63 et. seq), was also a notary public. Respondent lived near Thompson's office and would frequently visit her to have documents notarized. In or about early December 1996, some eight months prior to the entry of judgment, respondent after discussing the matter pending before Judge Lehner with Thompson, offered to handle an appeal from Justice Lehner's decision if that should become necessary. [4] According to Thompson, respondent stated she would be his "only" client, and he would devote his full energy to the matter. (TR 75-79)

Thereafter, respondent introduced Thompson to Stanley Chovnick, Esq., who, because of supposed expertise in real estate matters would act with respondent as co-counsel. There was never a written retainer Thompson testified that respondent had agreed that he would charge $125 hourly for this time. (TR 77) The respondent disputes

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[4] Apparently certain additional extensive motion practice was contemplated and engaged in

this and claims, in conflict with some of the documentary evidence, that the agreed hourly rate was $300.

The record amply demonstrates that throughout 1997 Thompson paid substantial legal fees to respondent and other counsel utilized by respondent. During the first part of 1997, Thompson at respondent's directions (TR 147), wrote checks to Mr. Chovnick totaling $ 40,000 (TR 80- 81, Staff exhibit "6") from which respondent received $ 20,000. (Respondent's Exhibit "S"). During the -period of May-August, 1997, Thompson wrote three checks totaling $72,000,00 to respondent for legal fees (Tr. 83-84; Staff Exhibit 17) and, by further checks dated November 10, 1997, and January 10, 1998, paid respondent an additional $20,000,00 for legal fees. (Tr. 86-87; Staff exhibit 21. Thompson also paid George Zelma, Esq., (respondent's brother) an additional $10,000 for services rendered on her co-op matter. (Tr 286-287; staff exhibit 26). In all, Thompson paid respondent and his colleagues at least $142,000 for legal fees, as well as paying Appeal Press $4,205.55 for printing costs (Staff exhibit 18). With the exception of George Zelma's $10,000, not one payment was made by Thompson to respondent or co-counsel pursuant to a bill or statement; rather; Thompson wrote checks totaling $133,000 pursuant to respondent's oral requests without his providing an accounting.

As noted, the judgment entered on August 13, 1997 by Justice Lehner required Thompson to pay $ 95,000 to opposing counsel. In addition to the money paid respondent and his co-counsel as legal fees, Thompson, entrusted respondent with an additional $115,000 by way of two checks; for $50,000 and $65,000 respectively to provide collateral for an appeal bond. (Staff ex.19). The first was to be tendered initially to defendant's counsel in an attempt to settle the $95,000 judgment obligation. When that failed, the

second was added to be held in escrow to secure the payment of the $95,000 in the event Thompson lost her appeal (Tr 102-105).

By letter dated August 6, 1997, (Staff exhibit 2), respondent advised the bonding company, Fidelity and Deposit Co. of Maryland (Fidelity) that he "was holding $114,000 (sic) in his escrow account to indemnify Fidelity for any loss incurred in connection with the Appeal Bond "up to the amount of $ 95,000." Significantly, he also represented that " these funds will not be released to anyone else, including substitute counsel, without first receiving from (Fidelity) written approval to do so."

Thus, on August 5, 1997 respondent held in his Dime Savings Bank account, number 5286016279, and designated "Richard Zelma IOLA Account (the "escrow account) $115,000 in connection with the bond. The total in the escrow account as of the dated of the deposit was $165,452.40. The difference being legal fees previously paid by Thompson. Thus, he commingled his own money with that of a client. (Staff exhibits 3, 17, 19, 22, and 23); a fact respondent does not dispute.

Respondent maintained no ledger, or other record with respect to Thompson's $115,000. The subsequent commingling of a number of cash withdrawals and cash deposits into the escrow account tends to obscure the "money trail"; but only somewhat, It is quite clear that during the period 1997-1998 respondent depleted Thompson's $115,000 for his own benefit. Assuming that Thompson's money was not touched by respondent until all other available funds were exhausted, respondent's withdrawal of $42,000 in cash on October 22 1997, two months after the escrow deposit and his undertaking to the bonding company the overall

balance in the account was only $85,375.89. (Staff exhibit 3, at page C-11, and 22 line 58). The judgment below, although modified by the Appellate Division, was affirmed as to the requirement that Thompson pay $ 95,000 plus interests and costs to defendant's counsel in July, 1998. see Thompson v 490 West End Apartments Corp. et.al., 252 A.D.2d 430 (1st Dep't. 1998)].

Between October 1997 and August 1998 respondent continued to withdraw Thompson's escrow money, culminating on July 27, 1998 and August 13, 1999, after the Appellate Division affirmed the money judgment in cash withdrawals of $10,000 and $33,000, respectively (Staff Exhibits 3, 22, and 23); leaving a balance in the account of only $45.23 as of August 13, 1998. (staff exhibit 22 line 106).

Thompson testified that she never consented to respondent's taking any portion of the $ 115,000 held in escrow. (Tr 114,115; 128; 131-132). Both she and her son Steven Arkin testified that at some point in time (after the fact) respondent admitted to them that he had taken "$40,000" from the escrow account telling them he could be "imprisoned or disbarred" for this act. (Tr 204) Thompson strenuously objected to respondent's action and testified she never consented to his having done so either before or after she learned of the withdrawals. (Tr 112-114, 203-205) During direct testimony and respondent's cross-examination, Thompson denied that she was every advised by respondent of any further depletion of her escrow sums. (Tr. 115, 163).

According to Thompson, not only did she not consent to any taking from the escrow account, but she repeatedly pressed respondent for an accounting of the legal fees she had already paid to him and Chovnick. (Tr. 110-111; 116-118; 120, 121, 156) Tellingly, respondent's own November 10, 1997 and February 6, 1998 letters (Staff exhibits

4 and 5) which purportedly set forth fees owing, neither credit Thompson for the fees she had already paid him, or credits her for sums he had taken (and was continuing to take) from the escrow account. Thompson testified that an official from Fidelity, rather than respondent himself, ultimately advised her that respondent had depleted her $115,000 (Tr. 129).

Respondent's only response to Thompson's requests for itemized accounting was a series of hand-written notes, submitted to her in July 1998, purportedly describing fees owing from December 1996 through November 1997. (staff exhibit 8) These "notes" are often barely decipherable and include such amazing entries as "7/31/1997 file and serve affidavit - 12 hours " 10/20/97 - review 20 hours' 11/10/97 excellent proof - 10 hours"; 01/29/98 - oral argument - 40 hours; 11/3-11-10 /97, review 79 hours" (see staff Exhibits 8 and 9)

When he rendered a bill after Thompson insisted on an accounting, his bill dated November 15,1997, (Staff exhibit 4), he credited Thompson only with a $10,000 check she gave him on November 12,1997 (staff exhibit 4). By the time the balance in the IOLA account was only $85,375.39 (staff exhibit 22, line 58). No mention was made of the money he has already withdrawn. Apparently the conversation about the $ "40,000" referred to Thompson's testimony (Tr. 112 et. seq.), and in her son's testimony (Tr. 204) came later. Respondent did not seek, nor did he obtain approval from Fidelity to withdraw Thompson's any part of $115,000. (Tr. 303-304).

For his defense, respondent, in addition to his claim that Thompson consented to his withdrawal of the escrow funds, argued that she agreed to a $300 hourly rate, and her denial affected her credibility (despite the fact that his own

documents suggested a variety of rates; (e.g. Staff exhibits 4, 5, 10, 11). He also maintained the propriety of his fee, because of the importance of the work he performed on Thompson's behalf, and the benefit she derived. He attempted to place into evidence various self-serving and essentially irrelevant letters he had purportedly written Thompson, a copy of the record on appeal and a copy of his brief. Since he chose neither to confront Thompson with the letters on cross-examination or establish any type of foundation for them, they were not admitted into evidence. (Tr. 375 et seq).[5]

When respondent focused on the central issue of consent, he maintained that Thompson at all times knew he was taking the escrow money for his fees, and that therefore she impliedly consented. The only evidence supporting his defense are his own self-serving and totally uncorroborated statements. He also urged that the had an "account stated"; that he had a retaining lien on the money, and was entitled to self-help. (respondent's exhibit S Tr. 302,306)

FINDINGS OF FACT

As demonstrated by Respondent's Answer to the

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[5] With his post-hearing submission he sent 44 documents marked "S1-S44" as attachments to his written statement which I, received in evidence as Respondent's Exhibit S. The "exhibits"were never offered or marked at the hearing. Except for the letter he marked S38, which I have accepted as Referee's exhibit 12, his post-hearing submission of "Exhibits S1-44" are rejected as irrelevant, incompetent, unauthenticated and unauthorized. They will not be considered to be part of the record before me.

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Charges, the Pre- Hearing Stipulation of Facts executed by counsel, (Referee's exhibit 6), respondent's statement on the record the underlying facts are essentially undisputed. The material facts with respect to Counts Two through Eight were admitted. The only material fact in dispute is whether at the time(s) resp ndent withdrew any, and eventually all of this client's full knowledge and consent. Respondent does not dispute that he commingled funds with his own, failed to keep required bookkeeping records regarding his escrow account, made numerous cash and ATM withdrawals from his escrow account, and violated his pledge to the bonding company to maintain the funds in his escrow account.

If the matter was only a "swearing contest" between Thompson and respondent, I would have little difficulty crediting Thompson's testimony. Her demeanor and forthrightness on the witness stand made her testimony quite convincing. Equally convincing was the testimony of her son, Mr. Arkin. It would have made no sense at all for Thompson to consent to respondent's taking any part of the $115,000 from escrow when he failed to provide any itemization for the $133,000 she had already paid him and Chovnick.

The record however, contains much more besides Thompson's testimony to render incredible respondent's defense of "consent". First, his own billing letters to Thompson dated November 15, 1997 and February 6, 1998 (staff exhibits 4 and 5) fail to mention much less credit the money he had already taken from the escrow account (or for that matter any of the sums she had already paid him). Second, in an August 26, 2000 rambling letter to Thompson's subsequent counsel (staff exhibit 15), respondent attempted to "settle" the matter, says that Thompson promised to pay him his fees in 1998, but nowhere claimed that Thompson had consented to his taking his free from the

escrow. In fact, he claimed that Thompson agreed that the sums claimed in November 1997 and February 1998 would be due by the spring of 1998, but respondent had substantially commenced his conversion activities well before then. Third, his own purported "billing records" (staff 8) are so bizarre that they cast relevant doubt on respondent's general credibility. Finally, respondent's own (partial) Form 1040 Schedule C for his 1997 and 1998 Federal tax returns belie his claims. (referee ex. 10 and 10A) [6]

In letters dated October 22, 1998 and August 16, 1999 to Fidelity (Staff Ex. 13 and 14), respondent claimed that he had taken the $115,000 as his "legal fee" with Thompson's consent. There is no evidence of this other than respondent's totally self-serving uncorroborated and inconsistent statements. Further, he advised Fidelity to look to Thompson for any recovery of the $115,000, Fidelity was liable on its bond for $95,000, plus interest and he gratuitously and inconsistently offered to assign any outstanding claim he may have against Thompson to Fidelity. It is hard to fathom what his claim was if the fee was paid. The withdrawal of the $115,000 was surreptitious. It was without notice to Thompson or the bonding company.

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[6] Thompson's total fee payments to respondent during 1997 and 1998 together with the $115,000 respondent took from the escrow account in those two years and the money he received from Chovnick, totaled $227,000. Respondent claimed total gross receipts for these two years of $150,750. Assuming, arguendo, that respondent's only source of income was from Thompson, this leaves an unexplained shortfall despite Respondent's claim that he fully reported the money as fee income.

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Motion to Reopen the Record

The hearing was concluded on June 27,2001. It was agreed that proposed findings of fact and conclusions of law would be submitted on or before July 16, 2001, and that I would accept affidavits as to character, if they were limited to character, but would reject them if they attempted to deal with the merits. I specifically advised the respondent, "I am telling you now that I will not accept Chovnick's affidavit if it deals with the merits. (Tr. 502).

This followed the colloquy on Monday, June 25, 2001, (Tr. 252), when respondent informed me that he intended to call Mr. Chovnick as his first witness but that Chovnick would not be available until Wednesday afternoon at 2 o'clock. I advised the respondent of the requirement that hearings on the merits be conducted on consecutive days. At the end of the day I agreed to hear Mr. Chovnick's testimony during the sanction portion of the hearing, and that if he were the only witness we could go over to Wednesday at 2 o'clock (Tr. 391) to accommodate the respondent and Mr. Chovnick. After being told by respondent that he would have four witness on the issue of mitigation before calling Mr. Chovnick, the hearing was adjourned to Wednesday, June 27, 2001 at 10 AM.

But there were no four witnesses on Wednesday. There was only a letter from one Rolland S. Parker, Ph.D asking that I grant a further adjournment so that the respondent can consult with him. There was no indication of any prior relationship with the respondent or that he had anything to offer that would be relevant. There was, however, further testimony from the respondent's brother, George Zelma Esq. about an accident and serious trauma involving the respondent.

Despite all the suggestions about accommodating Mr.

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Chovnick, I was eventually informed that Mr. Chovnick would not be available at 2 o'clock as promised, nor would be available at any other specifically defined time (Tr. 432 et. seq.)

Notwithstanding all of that Chovnick discussion as to his unavailability and what he could submit, or not submit by way of affidavit or affirmation on June 27, 2001, I received a Chovnick affidavit notarized that day with Exhibits dealing almost entirely with questions relating to the hourly rate, conversations with Thompson and her son, and other such matters. With the exception of two sentences which purportedly go to character, the affidavit relates only to respondent's notion of what is relevant to the merits and things which respondent believes are admissible to impugn Thompson's credibility.

But respondent's willfulness and persistence doesn't end there, In his post-hearing submission dated July 18, 2001 he states that he relies on the rejected Chovnick affidavit for his proposed findings, and on July 23, 2001 he moved to reopen the record to receive the Chovnick affidavit "in its entirety" because of that reliance.

I don't believe he ever intended to call Chovnick as a witness and subject him to cross-examination. Respondent had every opportunity so to do but didn't. The transcript (Tr. 502-504) makes it abundantly clear that what he intended to submit at 2 o'clock that day was the previously drafted Chovnick affidavit.

For the reasons set forth above, the motion is denied.

CONCLUSIONS OF LAW

In sustaining Count One, I find that respondent neither had Thompson's consent nor authority to withdraw her $115,000, He acted with the requisite venal intent to

sustain a charge of conversion under DR 1-102 (A) (4). He knew he was not entitled to take the money, did not have the authority to take it, but did so anyway. See Matter of Neufeld, 268 N. Y. 2d 57 (1st Dep't 2000); Matter of Murlow, 241 A.D. 2d (1st Dep't 2000); Matter of Britton, 237 A.D. 2d 17 (1st Dep't 1999). Not only did he fail to obtain Thompson's consent, he certainly did not notify Fidelity or obtain their consent, as he represented to them that he would do in his August 6, 1997 letter.

Respondent's representation made to Fidelity that he had taken the $115,000 with her knowledge and consent was false, as were his representations he would hold the money to indemnify Fidelity, thus further violating DR 1-102 (A) (4). Count two therefore is sustained.

Respondent's self serving and self justifying letters to Fidelity at Thompson's expense constitute conduct intentionally prejudicing or damaging a client in violation of DR 7-101 (A) (3). Count three is sustained.

The moment respondent allowed the escrow account balance to drop below the balance required to maintain Thompson's $115,000 (at the latest-October 22, 1997) he failed to preserve the identity of her funds, in violation of DR 9-102 (A) and (B). Charge four is therefore sustained.

Respondent's own admissions and his bank records attest to his cash and ATM withdrawals for the escrow account, in violation of DR 9-102 (E). Count five is sustained.

All of respondents's described conduct adversely reflected upon his fitness to practice law, in violation of DR 1-102 (A) (7). This is not, as respondent maintains, a merely "cumulative" charge. While there is no direct proof that at the time respondent sent his August 7, 1997 letter to Fidelity he specifically intended to perpetrate a fraud on Fidelity, his subsequent failure to abide by his own statements is

additional misconduct under DR 1-102 (A) (7). Therefore, for all of the above reasons, Count six is sustained.

Both respondent's testimony (Tr. 353-354) and Staff bank exhibits clearly establish that respondent commingled his funds with a client's and failed to maintain required bookkeeping records, in violation of DRS 9- 102 (A) and DR 9-102 (D). Count seven and eight are accordingly sustained.

SANCTION

Respondent enriched himself at the expense of his client. He misappropriated to this own use $ 115,000; funds which were entrusted to him to be held in his escrow account. His client, Thompson, ultimately was required to repay Fidelity out of her own pocket for the funds taken by respondent intended to secure Fidelity. (Tr. 131). He failed to abide by his own promises to Fidelity and subsequently made false representations to it. Finally, his additional misuse of his escrow account - his commingling, his cash withdrawals, his failure to preserve client's funds, and his failure to maintain required bookkeeping records-violated virtually every provision of the Code of Professional Responsibility pertaining to the proper handling of attorney escrow accounts. At the hearing, except for apologizing for his DR 9-102 violations, respondent displayed no remorse for his misconduct and was unwilling to acknowledge responsibility for his actions.

Respondent has previously admonished by the Committee in 1998 as a result of his being found by the United States District Court, Southern District of New York, to have engaged in frivolous litigation. That court (Sprizzo J.) imposed a $10,000 fine pursuant to Rule 11, F.R.C.P. (referee Ex. 11, and staff Ex. 27 Tr. 413-417).

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The Appellate Division, First Department has consistently held that absent "extremely unusual mitigation circumstances", an attorney who has intentionally misappropriated funds is presumptively unfit to practice law. Matter of Tate, 258 A.D. 2d 120 (1st Dep't 2000); Matter of Murlow (supra); Matter of Britton, supra; Matter of Lubell, 190 A.D. 2d 479 (1st Dep't 1994).

Such "extraordinary mitigation" does not exist here. Respondent offered character testimony of his brother George, as well as an affidavit attesting to his character from Allen Grossman, Esq. (respondents exhibit X). He testified about the serious hit and run accident that befell him on January 1, 1984 which placed him in a month long coma and required a substantial period of physical rehabilitation. (Tr. 448-451) He has worked in a legal capacity since 1985, and there is no suggestion of current incapacity. When specifically asked, respondent stated that there was no pertinent medical evidence to indicate that his accident in any way affected his judgment or competence pertaining to activities in the Thompson matter. (Tr. 494-495). Thus, while I credit respondent's testimony and that of his brother regarding his serious and unfortunate 1984 injuries, he did not demonstrate a casual connection between his 1984 accident and his 1997-1998 misconduct. See Matter of Neufeld, supra, Matter of Rivera, 230 A.D.2d 74 (1st Dep't. 1917).

Respondent not only failed to exhibit any remorse for his wrongdoing; except for saying that he learned belatedly that he should not have made cash withdrawals, he didn't acknowledge any wrongdoing. He falsely claimed that his client's consent to remove the funds, but also argued that he didn't need consent.

There is nothing in this record to suggest that the respondent had learned anything from his prior discipline. He

argues that the sanction imposed by Judge Sprizzo in the United States District Court for the Southern District of New York, Levine v County of Westchester, et. al. 92 Civ. 1702, S.D.N. Y. (JES), (referee ex. 11), and that the prior admonition based on his conduct in that case, (staff ex. 27) should not be considered because more recent decisions of this Court, the Supreme Court and the Court of Appeals should be read to justify what he did in the Levine case. (referee exhibit 12). He ignores the substance and the language of the Judge Sprizzo's opinion, and rationalizes his conduct as he has done persistently in his case.

He frivolously applied to the Appellate Division to quash the Departmental Disciplinary Committee's Judicial Subpoena Duces Tecum (M-6964 unpublished dated January 24, 2001), and thereafter sought to avoid service of the Notice of charges (referee ex. 13). After he effectively dismissed his counsel (referee ex. 8), claiming ethical violations, he objected to counsel being relieved, sought a review of that ruling and obtained an adjournment of the hearing from the Court (May 21, 2001) to give him additional time to retain counsel. He made a further application to the Court for a stay on June 1, 2001; which was denied (referee Ex. 4, M-3122 unpublished, dated June 11, 2001). He then moved to stay that order and to reargue it the day before the hearing was scheduled to begin. (Referee Ex. 9., Tr. 5427). Obviously there is nothing inherently wrong with a respondent seeking to assert and protect his rights in a disciplinary proceeding. This respondent has made it an art to avoid or delay having to confront, accept, or recognize the fact that the may have done something wrong.

One might argue that inasmuch as the purpose of attorney discipline is to protect the public rather than punish misconduct; that inasmuch as the respondent does not have

an extensive practice a recommendation of suspension rather than disbarment would suffice. I have considered and rejected that alternative for all of the reasons set forth above.

Notwithstanding respondent's naive and appealingly innocent affect, I find respondent to be willful, deceitful and manipulative individual who has shown himself to be unwilling to accept responsibility for his actions, and who seeks to avoid or delay the consequences of his actions. He would seem to think that the rules, whether of procedure or ethics, are not necessarily applicable to him.

CONCLUSION

Given respondent's pattern of serious professional misconduct the lack of any relevant factors in mitigation, and his inability to recognize the seriousness of his misconduct, I see no appropriate sanction under this jurisdiction's precedent other than disbarment. I further recommend that, pursuant to Judiciary Law ¶ 90 6(a)(a), that the Appellate Division, First Department's order disbarring respondent should specifically direct him to make monetary restitution of $115,000 to Ms. Thompson and/or, if appropriate, Lawyers Fund For Client Protection.

Respectfully submitted,

Dated: August 25,2001

Justin N. Feldman
Referee

APPENDIX E

Proceedings

TRH - p.19

STEVENS: That's it.
REFEREE: Right That's the other
STEVENS: I'm glad you have it.
REFEREE: Thank you. I now see that as of yesterday, by order of Justice Lehner, your application for further adjournment was denied. Have you made available these Referee's exhibits to Mr Stevens?
BRATTON: Yes, they're all
REFEREE: You may proceed
BRATTON: A couple of ministerial matters before I begin my opening statement, and I do understand that Mr. Stevens has a few preliminary matters he wants to bring up too before we being Staff's case in chief order into evidence, The first matter I'd like to I think the record should reflect that we have pleadings, we have answer, we have charges, we have answer, and we also have a pre-hearing stipulation between the parties dated April 19, 2001. Let the record reflect that I had previously furnished the Referee and Mr. Stevens copies of this pre-hearing stipulation. I would now like to formally offer Referee's 6 into evidence.
REFEREE: Any objection?
STEVENS: he April 19 stip?

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BRATTON: Right

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STEVENS: No objection
REFEREE: Received (Referee Exhibit 6 received in evidence)
BRATTON: Thank you. Do you have a copy Mr. Feldman?
REFEREE: I believe so. And that's Committee 1?
BRATTON: It's Referee's 6.
REFEREE: it's a Referee's exhibit. Let me just make sure I have it
STEVENS: May I bother this man here for some paper? Do you have extra paper I can borrow?
BRATTON: that was April 16?
BRATTON: 19th
STEVENS: And that's a stip signed by Mr.
BRATTON: Supple and myself
STEVENS: Not by me, correct?
BRATTON: Right, he signed on your behalf.
STEVENS: Okay.
REFEREE: I thought I had it with me.
BRATTON: I have an extra copy
REFEREE: Oh, wait, here it is.
BRATTON: If I can approach the Referee?

TRH - p.21

REFEREE: Please.
STEVENS: Do you have an extra copy of that stip?
BRATTON: I can get one.
STEVENS: I'm sure I have it somewhere.
BRATTON: I have extra copies of the unsigned. I have one extra copy. You may copy during the break.
STEVENS: All right Okay, or-something like that.
REFEREE: Okay, you have another copy?
BRATTON: Yes, I have another unsigned copy. I can make

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sure during the break that we get copies of the signed version

REFEREE: Thank you. All right, proceed.

BRATTON: would ask that the record reflect that previous to this proceeding I had furnished copies, both to Mr. Stevens and to the Referee, pursuant to the stipulation executed on April 19, copies of Staff exhibits 1 through 15, and I want the record to also reflect that since that time, I have also furnished Mr. Stevens copies of other exhibits I intend to offer during my direct case. I did not furnish you with copies

TRH - p.22

because this was not by stipulation. I just gave him informational copies. And I have furnished Mr. Stevens with copies of everything I intend to offer into evidence today with the exception of what I marked as Staff 21, and I would like the record to indicate that I'm handing a copy to Mr. Stevens now.

REFEREE: The stip is Referee 5, is that it?

BRATTON: Referee 6.

REFEREE: Referee 6. Okay, that's admitted without objection. Excuse me, I do have a copy of the stip. You can have yours back. Any other housekeeping?

BRATTON: Yes, I had previously advised Mr. Stevens that I was going to call as witnesses today Lauri Thompson and accountant for the Committee, Martin Schwinger. Through my own inadvertence, and Mr. Stevens pointed this out to me, I failed to notify him that I also intended to call as a witness today Mr. Steven

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Arkin. I would like the record reflect and I so advised Mr. Arkin that if Mr. Stevens chooses to defer his cross-examination till a subsequent day of hearing, I would have no objection to that.

REFEREE: Do you have any comment, Mr. Stevens?

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STEVENS: I am unsure of what the procedure is, but I did not know that Steve Arkin would be called. So I object to his being called. You can't object to his being called on direct.

STEVENS: Okay.

REFEREE: I mean, you can, but Mr. Bratton has said that he would not object to your having an adjournment for purposes of cross.

STEVENS: Right.

REFEREE: So then you will not only have notice of the fact that he was going to testify, but you will have notice of how he did testify. So how are you prejudiced?

STEVENS: Well, I have not made my comment yet about this whole procedure at this point.

REFEREE: Oh, okay, fine.

STEVENS: So on that, on the condition that I can make a comment and have a discussion --

REFEREE: You'll be permitted an opening statement as soon as Mr. Bratton finishes his opening statement.

STEVENS: Then I have no objection if I can have it adjourned and if I can only have an adjournment with respect to Miss Thompson as well as

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cross-examining her.

REFEREE: There are no further adjournments in this except that if you, at the end of Mr. Arkin's testimony, you say you need time to prepare cross-examination, I will give you time to prepare cross-examination. That's it.

STEVENS: Okay.

REFEREE: Do you have an opening?

BRATTON: A few more house matters, and then I'll be ready for opening.

REFEREE: Okay.

BRATTON: The record should reflect that the pre-hearing stipulation listed a set of proposed exhibits for Mr. Stevens --

REFEREE: I can't hear you.

BRATTON : Okay, the record should reflect that in Referee's 6, I draw your attention to page 5, there's a list of respondent's exhibits which to my knowledge have not been furnished to the Referee, and I think the record should reflect that Mr. Supple had furnished me with copies of these documents, and I do have faxed copies of most of them. I do not have exhibit D, a brief for plaintiff filed with the Appellate Division. In the future if Mr. Stevens can provide me with a copy, I would appreciate that.

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He also advised, I've also on page 6, a list of witnesses by Mr. Stevens would be Mr. Stevens himself and one Stanley Chovnik. Mr. Stevens has advised me that he

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intends to call some other witnesses. Today, I don't have the names of the witnesses nor do I have copies of any other documents he proposes to -

REFEREE: When can your furnish those, Mr. Stevens?

STEVENS: I have them here, but this is all part of my introductory statement. I'm trying to --

REFEREE: Furnishing the names of the witnesses and furnishing copies of proposed exhibits is something to do with your opening statement?

STEVENS: It does.

REFEREE: Well, I don't understand it, but I'll await it. Yes, sir.

BRATTON: At this point, do you wish me to proceed with my opening statement on the merits?

REFEREE: Please.

BRATTON: Thank you. Just one minute please. Mr. Feldman, Mr. Stevens, I'd like to keep my opening statement rather brief just to give you an overview of what this case is all about, and I propose to do it count by count.

The first count in the charges is, of course,

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the most serious count. It's the charge of intentional conversion in violation of Disciplinary Rule 1-102 (a) (4). The record will demonstrate, and it's not disputed that Mr. Stevens' client, Miss Thompson, entrusted with him the sum of $115,000, and the checks will be part of the evidence that Staff will offer in its case in chief, entrusted with him to

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undertake a bond. And the whole purpose of this was not for fees, not for any other purpose, but to secure a bond for Miss Thompson's appeal of a Supreme Court case which he retained Mr. Stevens to take care of.

And the evidence -- this is stipulated to and it's also admitted in the answer -- that the checks were duly furnished to Mr. Stevens, he duly furnished, and put these checks into his escrow account, and subsequently sent a letter to the bonding company stating that he was holding the money and that these funds would not be released to anybody without the consent of the bonding company.

The main elements of a charge of intentional conversion are three. One, he had the money. There is no dispute in the record that Mr. Stevens had the money. Two, he took the money. The record will indicate both in his bank statements and the analysis

TRH - p.27

that we had with my accounting who will appear as a witness today that he did over a period of time deplete the entire $115,000 from his escrow account beginning in the fall of 1998 and continuing throughout 1999. The third element, and this is important for a case involving intention conversion, he had neither the authority nor had he the consent of the client.

Staff's contention is that he at all times took the money without either the authority or

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knowledge or consent of Miss Thompson.

REFEREE: Or the bonding company.

BRATTON: I'm sorry? Or the bonding company.

REFEREE: Because this was an escrow account an escrow agreement?

BRATTON: The only agreement, that even approached an agreement was simply the letter which --

REFEREE: That he was going to hold it.

BRATTON: Yes, and that's already in evidence.

REFEREE: And that it was in his escrow account.

BRATTON: Yes. Yes.

TRH - p.28

REFEREE: It's in evidence?

BRATTON: Yes, it's by stipulation, Staff exhibits 1 and 2.

REFEREE: Have you moved the Staff exhibits or do you intend to move the Staff exhibits?

BRATTON: This might be as good, that's one item I should have taken care of before my opening something. At this time, per stipulation, I offer into evidence Staff exhibits 1 through 15 into evidence.

REFEREE: 1 through 15. Have you seen all of those, Mr. Stevens? Do you have any objection?

STEVENS: Do I have any objection? Only to the extent that --

REFEREE: Do you have any objection as to authenticity?

STEVENS: No, there's no objection.

BRATTON: The evidence will show --

REFEREE: Do I have 1 through 15?

BRATTON: Yes, you do.

(Staff Exhibits 1 through 15 received in evidence)

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REFEREE: I'm sorry, go ahead.
BRATTON: Okay. Now, as indicated by the bank records which are already in evidence, the money

TRH - p.29

that he was holding for Miss Thompson started to decline in the fall of 1998. By August of 1999 it was completely gone. The evidence will show, and you will hear this by the direct testimony of both Mr. Arkin and Miss Thompson that sometime in the fall or early winter of 1998, he did inform Miss Thompson that he had taken out $42,000 over her --
REFEREE: How much?
BRATTON: $42,000, over her vigorous protest she will testify that she never consented to any taking of the money. And the evidence will show that there's completely no other indications that at any time Mr. Stevens had advised Miss Thompson that he had taken the money. As a matter of fact, you need not rely only on the testimony of Miss Thompson and Mr. Arkin, you will also have in evidence Mr. Stevens' own writings, his own letters, his own billing statements which give him not only any credit for the money he had taken from the escrow account for the bond, but he neither gave her any credit for the checks that she had written beforehand in 1997 for his legal fees. And those checks will be offered into evidence today as well as the testimony of Miss Thompson.

As I said, partially this is a credibility

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issue. Mr. Stevens claims that he took the money with her full knowledge and consent; she says she never did. Of course, I ask you to view what you think is appropriate as far as who is credible and who is not, and I ask that you not only consider the testimony of Ms Thompson and Mr. Arkin but also both records and letters by Mr. Stevens' own hand which indicates that there was no consent.

REFEREE: Well, let me ask you, what would the relevance of her consent be if, in fact, he had pledged to the bonding company that the company would not be withdrawn?

BRATTON: It'll be relevant to the charge of DR1-102(a)(4). It'll be relevant to the charge, the final count in here, which is count 6 which is the general count, charge of conduct which adversely reflects upon his fitness to practice law.

REFEREE: You say it would be, that had she consented, it would have permitted him to withdraw the funds and it would not have been a violation of 2 (a) (4)?

BRATTON: It would not have been a 102 (a) (4) violation, but it would have continued to have been a 102(a) 7). The bonding company

TRH - p.31

specifically relied upon -- they were not the client, they were not the fiduciary. And I've looked for precedent in this jurisdiction on this issue, and there is none. And I would represent that the bonding company relied upon his, and his failure to keep the money in

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the account, as he stated to the bonding company, would be a charge of 102 (a) (7). So contrary to what Mr. Stevens claims in his answer, account number 6 is not a superfluous charge. It directly goes to his actions vis-a-vis the bonding company.

REFEREE: 1-102(a) (4) speaks of conduct involving dishonesty, fraud, and deceit or misrepresentation. Would not a misrepresentation to the bonding company be a violation of (a) (4)?

BRATTON: Yes, it would not be, you could still find 102(a) (4) with respect to the misrepresentation made to the bonding company, but you would not find conversion. 102(a)(4) would still stand for that proposition.

REFEREE: But not for conversion?

BRATTON: That's right. It would still be a misrepresentation to the bonding company though. In other words, if you were to find that, yes,Miss Thompson, indeed, consented to the withdrawal of her

TRH - p.32

money, you would not find 102(a) (4) with regard to conversion, but you can still find 102 (a) (4) with regard to the misrepresentation to the bonding company as well as conduct which adversely reflects upon fitness to practice law in violation of 1-102(a)(7).

REFEREE: So you're saying there can't be a conversion with respect to the bonding company even though it had an interest in that money?

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BRATTON: That's right, but there would still be a misrepresentation, so you would still have the 1-102 (a) (4) as well as (a)(7).

REFEREE: I understand.

BRATTON: Now you're going to hear, I expect to hear Mr.Stevens argue that that was money already owing him for fees and she consented. The evidence will show, number one, she had already paid him and his colleague Mr. Chovnik over $100,000. You will also find that in his billing statements to her, his billing letters to her, he gives her no credit, not only for the money which she had already paid, but for the money he had, as Staff alleges, surreptitiously taken from her from the account. This is not, as Mr. Stevens will allege, an

TRH - p.33

account-stated. You will hear Miss Thompson testify over and over again she asked Mr. Stevens account for the money I've already paid you. The only record of any accounting made by Mr. Stevens is in his own writing literally, Staff exhibit 9, and you may draw your own conclusion by looking at this document whether this in any way constitutes any type of accounting for the money that she already paid him. This is not an account stated. Mr. Stevens wanted the money, he needed the money, and he took it. You will see in the record that Mr. Stevens does have a history of very thorough writing.

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If there's anything that he thinks is important, he'll put it down in writing. You will not see any mention either of the money that he had taken from the escrow account nor will you see any credit given to Miss Thompson for the over $100,000 she paid Mr. Stevens and his counsel.

Even if he had money owing, this is not a fee dispute. Let's assume that Mr. Stevens had money owing to her, and you can draw your own conclusions you see how much money she had already paid him and what he did. But let's assume for a minute that he did, in fact, have money owing to him, that money

TRH - p.202

Arkin - Direct

WITNESS: In Miss Thompson's office, yes.
BRATTON: Did there come a point when Miss Thompson retained Mr. Stevens as her counsel?
WITNESS: Yes.
BRATTON: And was that in connection with her 490 West End Avenue matter?
WITNESS: Correct.
BRATTON: Did you take part in any conversations with Mr. Stevens about this matter?
WITNESS: We had a lot of conversations, yes.
BRATTON: How many times over the period 1997 through 1998 would you say you spoke with Mr. Stevens about Miss Thompson's matter?
WITNESS: Numerous. I can't put a number on it.

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BRATTON: Would it be over 100?
WITNESS: No.
BRATTON: Between 50 and 100?
WITNESS: Yeah.
BRATTON: Were you aware that a bond had to be issued with respect to attorney's fees in the underlying matter?
WITNESS: Yes.
BRATTON: And who negotiated with the bonding company?

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WITNESS: I did.
BRATTON: Could you give Mr. Feldman's the details as to your contact with the bonding company?
WITNESS: Well, I used a bonding company that we had used in work, Arthur B. Levine. I had talked to them what it was. In essence, it was an appeal bond, and they wanted the full cash value of the bond to be held by the attorney.
BRATTON: Did you agree to that?
WITNESS: I did not agree to it, but it was agreed to, yes.
BRATTON: Okay, and as a result, if you know, was money put into Mr. Stevens' escrow account
WITNESS: Correct.
BRATTON: -- for that purpose? And you did the direct negotiations?
WITNESS: Correct.
BRATTON: Now I want to fast forward a bit to late 1997/1998, did you ever have any discussions with Mr. Stevens about his taking parts or all of the $115,000 as his legal fee?
WITNESS: He came one evening to talk to my mother --

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REFEREE: When?

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WITNESS: It would be, I can't fix an exact date. He was in and out so often, it was an evening before the motion was filed with the appellate court. He came and he announced that he had taken money out of the escrow account, about $40,000. The next words out of his mouth was you realize that I could go to jail and be disbarred, and I said to him jail was fine.

BRATTON: What happened after that?

WITNESS: Well, he rendered my mother almost totally speechless, and he had begin to talk to her about filing an appeal, and how if an appeal was filed, she would be able to win all her monies.

BRATTON: Did your mother, after that conversation --

REFEREE: Excuse me, wasn't the appeal already filed? Wasn't the bond already --

WITNESS: The bond was in place but nothing had been filed with the appellate court.

BRATTON: Now after that conversation, did you personally see Miss Thompson consent to his taking $40,000?

WITNESS: Not at all.

BRATTON: Did you tell Mr. Stevens on your own behalf that it was okay for him to have taken the

TRH - p.208

REFEREE: You may inquire.

STEVENS: I'm going to elect to cross-examine him on Monday.

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REFEREE: Excuse me, you can either cross-examine him now or you may never see him again.
STEVENS: You're the one that said that.
REFEREE: Said what?
STEVENS: Didn't you say that or am I wrong? This is a surprise witness to me. Didn't we go over this before?
REFEREE: I don't care whether he's a surprise --
BRATTON: That was the witness I omitted to tell --
REFEREE: You omitted to tell him?
BRATTON: Yes.
REFEREE: Well, I think in view of the hour and in view of the fact that he's here and in view of the fact that his testimony is so limited, that I'm going to reverse myself on that. I'm not going to ask him to come back again. You have an opportunity to cross-examine now.
STEVENS: Okay.
REFEREE: If you want a ten or fifteen-minute recess before you start, I'd be happy to grant that.

TRH- p.209

STEVENS: Hi, Steve, how are you?
WITNESS: Fine.
STEVENS: Good. You never met Steve Chovnick?

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WITNESS: Yes, I did.
STEVENS: You did?
WITNESS: Yes, I did.
STEVENS: In his office?
WITNESS: In his office, I was there at the first meeting.

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STEVENS: With your mom?
WITNESS: Yes.
STEVENS: You were?
WITNESS: Yes.
STEVENS: Okay.
BRATTON: This is really outside the scope of my direct.
REFEREE: What?
BRATTON: This is outside the scope of my direct.
REFEREE: It's outside the scope of direct, but it's within the scope of his cross-examination.
STEVENS: I didn't even remember that.
REFEREE: And it's within the scope of that proposed affidavit of Mr. Chovnik that he wanted to introduce and it's within the scope of the $10,000 check that she said she issued to Mr. Chovnik at that time, and within the scope of Mr. Chovnik's letter saying that they were co-counsel. So I'll let him answer it.

TRH - p.211

REFEREE: Did your mother issue a check at that time?
WITNESS: Yes.
REFEREE: What was the amount?
WITNESS: I believe it was $10,000.

TRH - p.214

WITNESS: No, I do not.
REFEREE: But it was the first time you met Mr. Chovnik and it was in his office?
WITNESS: No, I think he's talking about, you're talking about in Mr. Chovnik's office?
STEVENS: No.
WITNESS: You're talking about the later conversation.

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REFEREE: What later conversation?
STEVENS: Between me and --
REFEREE: You had a later conversation?
WITNESS: Yes.
STEVENS: The conversation with Mr. Chovnik--
WITNESS: There was a conversation where you proposed to her that she file with the appellate court.
STEVENS: That I proposed to her to file with the appellate court.
WITNESS: Correct.
STEVENS: Okay.
REFEREE: The bond is already in place.
WITNESS: Correct.

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REFEREE: Wouldn't that necessarily, Mr. Zelma, been within the 30 days of the judgment?
STEVENS: Are you asking me?
REFEREE: Yeah.
STEVENS: I have no real comment on this.
REFEREE: As I understand it, the appeal would have to be filed within 30 days of the entry of the judgment.
STEVENS: Of the judgment by whom?
REFEREE: The judgment being appealed.
STEVENS: Notice of appeal, sure.
REFEREE: Yeah.
STEVENS: Sure. Which year are you talking about?
REFEREE: The entry of the judgment was on or about August 6.
STEVENS: That's correct, '97.
REFEREE: '97.
STEVENS: I have no further questions.

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BRATTON: No redirect.
REFEREE: Thank you very much. Do you have another witness?
BRATTON: Yes, if I can have literally two minutes to bring him up.
(off the record at counter 2598)

THOMPSON - DIRECT, TRH - p.112

November 15 billing statement, if you remember, were you aware that he had already taken $42,000 out of your escrow account money?
WITNESS: There was some point that he came in August of '97 and said that he had taken $40,000 out the escrow account.
BRATTON: Are you sure it's August '97?
WITNESS: No. No, I'm not sure.
BRATTON: Who was present when he --
WITNESS: My son Steve.
REFEREE: That he had taken how much?
WITNESS: 40,000.
STEVENS: In August of '97 I said this? Is that your testimony?
REFEREE: Excuse me.
BRATTON: I object.
REFEREE: Excuse me. You'll have your chance at cross-examining the witness. You may not know interrogate the witness.
STEVENS: Okay, I'm not. But did you say August of '97, that's all I want to know.-
BRATTON: I object to this.
REFEREE: She said what she said, it's on the record.

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STEVENS: Okay, fair enough.

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REFEREE: You put down what?
WITNESS: A sequence of dates, chronological dates.
REFEREE: Approximately?
WITNESS: August. August '97.
BRATTON: When did you first discover that Mr. Stevens had taken the entire $115,000 out of your escrow account?
WITNESS: As I recall, I believe the bondsman told me, Arthur Levine.
BRATTON: And when was that?
WITNESS: We were at a community meeting, he said to me you know that son of a bitch took the money.
BRATTON: Do you remember when that was?
WITNESS: No.
BRATTON: And was this the first time you realized that the money had been taken?
WITNESS: Yes.

APPENDIX F

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December 20th

Supreme Court, Appellate Division
First Judicial Department
61 Broadway
New York, N.Y. 10006

Departmental Disciplinary Committee:
Answer Re: # 99.3785 Verified

Richard Zelma, being duly sworn, deposes and says under the penalty of perjury pursuant to CPLR 2106 that deponent is Richard Zelma; that I have read the foregoing answer and know the contents thereof; that the same is true to my knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

1. This is a verified answer to an unverified complaint dated October 6th 1999. I was given permission to file this answer by December 20th 1999, by Ms. Rebecca Taub, on or about November 18th. This answer is timely and I respectfully submit that the complaint is without merit To simplify things somewhat, the entire record on appeal is separately attached hereto. The 1454 pages are in the possession of Laurie Thompson, so a duplicate is not necessary. Most of the orders and work that will be referenced to are referred to in the transcript. ["TR" -]. Every exhibit referred to, other than the affidavit of Stan Chovnick dated December 15th 1999, [exhibit "C"], has been given to Thompson beforehand If it is possible, please return

the record after your review. Furthermore, the memorandum of law dated December 20th 1999, is separately attached hereto, and is incorporated herein by this reference as though fully set forth.[7]

2. At first, the complaint of October 6th 1999, ostensibly signed by Laurie Thompson, was never verified, nor was it signed under the penalty of perjury. It is not notarized.

Credibility of Thompson
(a): Introduction

3. The entire complaint is based upon two material misrepresentations of fact. These two fabrications change the entire perspective of the matter. Ms. Thompson suggests on two occasions in this "complaint", that I was paid $146,000.00 in attorneys fees. The only figure that comes remotely close to this is my bill of February 6th 1998 for $144,500.00 which is based upon 580 hours of work. [see exhibit "B"]. And, this bill was predicated upon a former bill dated and served on November 15th and 16th of 1997. [see

---

[7] The following exhibits are separately attached hereto. Main brief dated November 9th 1997; Reply brief dated January 9th 1997; opposition brief dated January 7th 1998; memorandum and affirmation in opposition to motion to strike the brief and record dated December 1st 1997; also please see motion for leave to appeal dated August 14th 1998 separately attached; please return the same. No duplicates. And, the order dated September 4th 1997, granting the enlargement of time to perfect the underlying appeal entered on December 20th 1996, and denying the cross-motion to dismiss the appeal, is set forth at "TR" 32; and the order of Appellate Division dated December 23rd 1997, granting extension of time to February term on all matters, and otherwise denying the motion to strike, is attached hereto as exhibit "Q".

exhibit "A"]. That was served immediately after the main brief was filed on November 9th 1997. And, these bills were never paid! ["exhibit " "A & B"]. Here lies the first material misrepresentation of fact. The second material misrepresentation, is that the retainer fee was $125.00. per hour. The fee was $300.00. These fatally inaccurate statements are discussed herein. [see ¶'s 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, & 23 at pages 4-7; and ¶ 36 pages 11 & 12; and exhibits "C" "G" & "I" "J" attached hereto].

4. A review of the "complaint" dated October 6th 1999, starts off with a factual statement by Ms. Thompson that is not entirely accurate. She never mentioned anything about Mr. Peter Stern Esq. informing her that she should file for bankruptcy. The heart of the reason that Ms. Thompson lost the case was that her story that she did not "intend to occupy" the premises on the date of purchase was refuted by: (1); the mortgage broker; (2): her accountant; (3) the UCC filing statement; (4) the co-op president, and (5): the sponsor [Mr. Bogoni], who sold her the apartment. All 5 separate forms of evidence, established that Thompson had the intent to occupy" and or " reside" in apartment 1(c) when she purchased it in 1992. This refuted and or impeached Thompson's credibility. As the Appellate Division set forth:

> Ct: .. Although **plaintiff claimed** that the residential loan was for apartment ID alone, *her* **mortgage broker** *and* **accountant** *disputed* this, **and** the UCC filing statement *signed by plaintiff* indicates that both apartments were the subject of the loan and security agreement. **Further**, the Co-op's president and sponsor testified that it was their understanding that plaintiff intended to occupy

APPENDIX F

the apartment herself. **Neither plaintiff's testimony to the contrary, nor the fact that she did not ultimately occupy the apartment**, undermine the substantial evidence adduced at trial that she purchased the apartment with the intent to occupy it. Accordingly, we upheld the IAS court's determination that plaintiffs status as a holder of unsold shares was extinguished, and that her sublet was therefore illegal and constituted a breach of her proprietary lease." [Thompson v 490 West End Ave, 676 N.Y.S.2d 73, at 76, 252 A.D.2d 130 (1998)].

5. It is true that Mr. Peter Stern was replaced by the undersigned and Mr. Chovnick. This took place on or about December 11th 1996. [see "TR" 1108]. It should be noted that after possession was ordered in open court on May 15th 1997, ["TR" 125-1275], and when it was clear that the case would be appealed with there being no possible settling of the matter, Ms. Thompson agreed to change the attorney of record aspect of the case to the undersigned, on May 21st 1997. [see exhibit "R"].

6. Second Paragraph: This entire paragraph is both misleading and in essence, blatantly false.

First of all: Ms. Thompson never suggested of any problems that she had with Mr. Stern Esq. She informed me that she had lost a case that concerned the adjacent apartment. and for which I had no knowledge of whatsoever, before the time that the decision in the case was rendered on November 22nd 1996. [see decision of Judge Lehner attached to appeal transcript "TR" 6-9]. Secondly, at no time did I ever suggest that I would be the attorney in this matter. I specifically knew that it was professionally prudent for me to

introduce her to an attorney whose specialty was in real estate. [**EC- 6-3**]. I had very little knowledge in this specific area at that time. There is no time frame period in the complaint filed by Thompson. This too is in of itself deceiving. The year and month of the events are crucial.

7. The first time that I ever knew of this case was after the decision was rendered on November 22nd 1996. I asked for a copy of the decision. What I informed Ms. Thompson, was that I had a friend of mine from law school, who specialized in real estate. I informed her that I would be very pleased to speak with him and to see if he would be interested to possibly becoming the attorney. Therefore, on December 11th 1996, I introduced Laurie Thompson to Mr. Stanley Chovnick Esq.

8. Immediately, Ms. Thompson rejoiced and was very pleased by Mr. Chovnick. So, on December 11th 1996, a retainer agreement was entered into between the ["TR"1108]. A check for $ 10,000.00 was made out to Mr. Chovnick.

9. The terms were as follows: That Mr. Chovnick would be the attorney to handle all phases of negotiations and settlement with the firm of Rosen and Livingston. And, that if and only if the time would come, I would be the attorney to handle the appellate work. It was agreed that the hourly basis was $300.00 per hour. [please find the correspondence of Stan Chovnick Esq. dated June 4th 1998, incorporated herein by this reference as though fully set forth and attached hereto as exhibit "G"; see affidavit of Stan Chovnick dated December 15th 1999 attached hereto as exhibit "C" and incorporated herein by this reference]. It was Mr. Chovnick who was the primary attorney of record for the next 5 months, not the undersigned.

10. But it does not stop here. Ms. Thompson in her 'unverified' complaint of October 6th 1999, states that the retainer agreement was for $125.00 per hour. As set forth

beforehand, this is refuted by both Mr. Chonick' recollection of the events. [see exhibits "C" & "G"]. It is further refuted by the bills of Mr. George Zelma on this case after his meeting with her on or about July 23rd 1997. [see para.16 & 21 infra and exhibit "I"].

11. I made certain that no ethical duty was being violated as far as the oral retainer agreement. I requested this committee for an advisory opinion. [see page 72 of New York State Bar Association, The Lawyers Code of Professional Responsibility, " ADVISE ON ETHICAL QUESTIONS" attached hereto as exhibit "M"].

12. On November 12th 1998, the Committee on Professional Ethics issued an informal decision on this point. [see exhibit "M"]. Their first question was whether it was a matrimonial matter for which my reply was that it was not. They concluded that the retainer agreement need not be in writing and arbitration was not required. [see DR 2-106 C (2) B) & 2-106 C]. They then sent me their informal advisory opinion. [see advisory opinion of New York State Bar Association, Ms. Kathleen Baxter, dated November 12th 1998, attached hereto as exhibit "M" citing DR 2-106 (C); and (D) EC 2-19; also see and G.O.L 5-701 in brief dated December 20th 1999 Point A, separately attached hereto].

B. *Ms. Thompson's failure to reveal important relevant facts.*

13. Furthermore, Ms. Thompson fails to reveal that she made part payment of an outstanding stated account that was due on February 6th 1998, and for which she had full knowledge that the payment was credited to the outstanding balance due. No condition was imposed upon either of the checks for $ 10,000.00. [see exhibit " J" check # 8511 dated November 25th 1997; and check # 166 for $ 10,000.00

which was deposited on or about February 6th 1998, see exhibit" B"]. The failure to condition the payment as "payment in full" or in "full satisfaction", coupled with the fact that the payment coincided with the stated account and that she had welcomed the bill fully acknowledging that it will be paid in full, permits one to claim that the stated account was binding upon Thompson. [see point C, D, & E, of memorandum of law dated December 20th 1999; see 36 and entire answer **in passim**].

14. Of import, is that I had insisted on some sort of part payment as a result of my time from August of 1997 - November of 1997. [see exhibit "A"]. The check for $10,000.00 was only deposited in January of 1998. It was returned for insufficient funds. [see exhibit "J" check # 8511]. [see Points **B - E** to memo. dated 12/20/99].

15. The $300.00 retainer fee initiated with the meeting in the office of Stan Chovnick Esq. on December 11th 1996. [see correspondence dated June 4th 1998 attached hereto as exhibit" G"]. Mr. Chovnick reiterated this, together with other relevant points in his affidavit dated December 15th 1999. see exhibit "C"].

16. In the summer of 1997, there was a meeting at Mr. George Zelma's office on or about July 23rd, and the meeting included a discussion on the fees that were to be charged by him and the undersigned. Once again, the only fee that was raised and agreed upon was $300.00 per hour. And, there were at least 2 appearances before Judge Lehner by George Zelma and myself dated August 1st and 8th 1998. [see bill of Mr. Zelma dated July 30th; September 1st and September 10th of 1997 attached hereto as exhibit "I" and see "TR" 1329-1375].

17. In short, at all times the fees as corroborated by two separate attorneys was $ 300.00 per hour. And, as one can deduct by simple logic, the perfection of the appeal was

the heart of the retainer agreement at all times. A new retainer agreement was unnecessary. The initial retainer agreement specifically included the appeal. The undersigned was going to be lead counsel for the appeal in case the matter would not settle and or that the trial judge would not reverse himself.

18. The fee of $300.00 per hour was discussed on December 11th 1996 , and July 23rd 1997. Each of those discussions centered on the perfection of the appeal. It was witnessed by two separate attorneys. And, this was not excessive. The attorneys fees for Ms. Thompson's former attorneys, was upon information and belief, as follows;

> (i); $ 85,000.00 to Peter Stern Esq. the trial attorney; [4 day trial] and $ 10,000.00 to Kera Graubard & Litzman for filing the complaint. ["TR" 79].

19. Furthermore, Ms. Thompson fails to state that the attorneys fees from December 11th 1996-May 21st 1997, were paid to Mr. Chovnick and not to me.

> (ii): Approximately $ 50,000.00 to Stan Chovnick Esq. from December 11th 1996-May 15th 1997. [see correspondence from Ms. Thompson dated April 27th 1998 attached hereto as exhibit "E"].

20. All of the checks made out by Ms. Thompson on December 11th 1996; January 2nd 1997; March 30th 1997; April 21st 1997; were to Mr. Chovnick Esq. not me. [see exhibit "E"]. It is possible that the check on May 16th 1997, was made out to me, but I am not certain.

21. And, the check issued on or about July 24th 1997,

was in connection with the meeting held at the office of George Zelma on or about July 23rd 1997, in which the fees of $300.00 per hour were once again discussed in detail. And, as is evidenced by the billing of George Zelma, the fees were at $300.00 and only commenced after the check was issued and cleared. [see exhibit "I"].

22. Ms. Thompson fails to mention that her check of $ 10,000.00 issued on or about November 25th 1997, was returned for insufficient funds. And that the second check was issued with full knowledge that the part-payment was being credited to the full amount. And, her complaint alleges that she paid me $146,000.00 for attorneys fees! This is a complete fabrication. The only final bill, remotely close to this figure, with the balance due of $134,500.00, was never paid [see exhibit "A" "B" & "J"].

23. Therefore, it is crucial to point out that Ms. Thompson now misstates two crucial factual points in her complaint of October 6th 1999. The retainer agreement was for $300.00 per hour, not $125.00; and she has only paid $10,000.00 of $144,500.00. Those fees were due as of February 6th 1998. The contract could never be revoked thereafter and the rights vested when the performance was complete, on February 4th 1998. [see memorandum dated December 20th 1999 Points A-G].

> *Ms. Thompson had at all times instructed the attorneys to appeal this matter at all costs. Ms. Thompson was specifically informed of the danger to appeal namely to lose possession of the premises. It was her choice to proceed after being properly informed. [E-C- 7-8 complied with]. Ms. Thompson, at all times from the outset of the case, knew that the board sought possession of the premises.*

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After losing the issue of unsold shares, she knew that there was a distinct chance that possession could be lost.

24. At the meeting of December 11th 1996 with Stan Chovnick and Ms. Thompson, what was discussed was the fact that any appeal would be very difficult. It was at all times made clear to Laurie Thompson, that the chances to succeed on appeal was very remote. [8] Settling the matter so that the costs of losing would be de minimis, was the primary goal for Mr. Chovnick. [see exhibit "C" and "G"]. And let it be made crystal clear, both Mr. Chovnick and I were petrified that Ms. Thompson was going to lose possession of the premises. Ms. Thompson was informed in detail by Mr. Chovnick and myself of the harsh realities of refusing to settle the matter which was that possession of the apartment would be taken away from her. [see May 9th 1997 correspondence to Ms. Thompson from Mr. Chovnick & myself attached hereto as exhibit "N"; also see May 5th 1997 affidavit of Laurie Thompson at "TR" 1241-1245 ¶ 1-3; & see affidavit of Mr. Chovnick dated December 15th 1999 attached as exhibit "C"].

25. The issue of possession of the premises would have been the supreme victory for the board. This is what they at all times sought. Any suggestion to the contrary is refuted by the record itself.

26. Immediately after the motion under CPLR 4404 - 05 was denied by Judge Lehner on March 6th 1997, the

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[8] The only time that this changed was 4-5 months after the case was submitted to the Appellate Division as the odds of a reversal increase with time.

defendant served a **notice of auction** for the **sale** of the property for **March 26th 1997**. [see "TR" 1194]. As a result of this, the undersigned obtained a Temporary Restraining Order on March 18th 1997. [see "TR" 41-43]. This was supported by the affirmations of the undersigned and Mr. Chovnick and the affidavit of Laurie Thompson. [see "TR" 1179-1220]. This TRO was, and still is, a huge triumph, as the Appellate Division reversed the trial court on the issue of possession. [see Thompson v 490 West End Ave., 673 N.Y.S. 2d 73, at 76-78 (1998)].

27. As I saw it, it was absolutely crucial to make certain that our client took the order of December 20th 1996 seriously, and that she will cure the violation. ["TR" 7- 9]. It was clear that the sub-tenant, Dr. Felix, was just as much at fault as Ms. Thompson as he was represented by counsel; he had full knowledge that the board did not consent to the sublease; and he signed the sublease. So, it was my point to Mr. Chovnick and to Laurie Thompson that we had to get rid of Dr. Felix immediately, and if we go to the Appellate Division, we should go with a vacant apartment. Asking the Appellate Court to reverse the ruling of the trial court with a vacant apartment had a far better chance for success, than asking them to do so when the apartment is being occupied by that very tenant. This was agreed to by everyone. So before any notice of termination was filed by Rosen and Livingston in January of 1997, Laurie Thompson had signed an affidavit seeking the eviction of Dr. Felix dated January 3rd 1997. ["TR" 1138-1142]. The same was done by me on December 31st 1996. ["TR" 1113-1131 at 1130 ¶ 12]. The order to show cause was given to the clerk of the Court in Room 315 on January 6th 1997. ["TR" 62 (a & b); see "TR" 1172-1173]. That order to show cause sought the eviction of Dr. Felix, and for such other relief as the court may deem just and proper. ["TR" 62 (a)]. In addition, it sought a new

trial under CPLR 4404-05 based upon the legal arguments that were presented in the affirmation/memo. The motion pursuant to CPLR 4404-05, was timely as it was brought within 15 days from December 20th 1996. And finally, it should be noted, that the trial judge in his order entered on December 20th 1996 made clear that the court will retain jurisdiction on "any application" for the "issuance of a warrant of eviction". ["TR" 9]. Furthermore, Judge Schlesinger, the judge that issued a preliminary injunction on May 10th 1995, ["TR" 11-17], made clear that no issue is to be decided between these three parties in a summary proceeding in civil court. The injunction was granted upon the condition that Dr. Felix be included in the proceedings and that all "related matters" are to be tried in one forum, which was the action that was pending. ["TR" 17]. That was the law of the case.

28. Of further import is that the record reveals that the *Yellowstone* injunction was obtained by Thompson on October 31st 1994, ["TR" 79-86]. After the first decision was rendered on February 21st 1995 against Ms. Thompson, ["TR "20-26] a second Yellowstone injunction was granted on or about March 8th 1995. ["TR" 27-29]. The preliminary injunction was granted on May 10th 1995. ["TR" 11-17]. This extends itself to at least the time that the judgment was entered on December 20th 1996. ["TR" 6-9]. This was served on December 23rd 1996. ["TR" 1165]. As a result of RPAPL 753 (4), and the ruling rendered by the Court of Appeal in 1984, Thompson had 10 days from the time that the decision was served upon the attorneys to cure the violation. With such a cure, there could be no "default". Without a "default", the board has no right to consider the shares to have "been surrendered; no right to collect any rent from the sublessee; and no right to sell the shares." In essence, without a default, there was no violation. There

could be no surrender of the property. The cure as of January 6th 1997, precluded any subsequent attempt for the co-op board to claim that a notice of termination had any legal relevancy. [see proprietary lease, "TR" 726 ¶ 32 (b); 32 (c); and 34; see Post v 120 East End Ave. Corp. 62 N. Y. 2d 19, at 26 (1984): cited in the main brief pages 48-52; reply brief pages 31-35; and maintained to the trial court on August 8th 1997 at "TR 1361 lines 7-17 and thereafter on August 25th 1997 from "TR" 1379-1400]. The filing of the order to show cause on January 6th 1997, was timely, and proved to be of import at the end, as the Appellate Division ruled that this cured the violation, and they reversed the trial court's judgment as it related to possession. [see Thompson v 490 West End Ave. 677 N.Y.S. 2d 73, at 77-78 (1998)].

29. The issue of "possession" and how this was a crucial aspect of the case was at all times brought up before Judge Lehner, to no avail. Pursuant to his directives of August 8th 1997 in open court, he wanted to see how Ms. Thompson sought to evict Dr. Felix in the motion that was brought on January 6th. "TR" 1361 lines 7-17]. After this was done, the trial judge nevertheless, denied the order to show cause to stay the judgment awarding possession of the premises to 490 West End Ave. In his decision dated September 2nd 1997, Judge Lehner confused the stay on the warrant of eviction with a stay on possession. ["TR" 71-72]. The trial judge thought that the appeal would not raise possession being awarded to 490 West End Ave. He concluded that the appeal was limited to the issue of "unsold shares". He was mistaken. ["TR" 71-72"]. One-half of the appeal concerned itself with possession and whether it remains in the hands of appellant, Ms. Thompson. And indeed, one half of the decision rendered by the Appellate Division on July 14th 1998, discussed "whether plaintiff cured the violation in a timely manner so as to retain

possession of the apartment." [Thompson v 490 West End Ave. 676 N. Y.S. 2d 73, at 76, 77-78 (1998)].

30. Laurie Thompson owns apartment 1(c) solely by virtue of the hard work at all times since December 11th 1996. I argued this in each of the briefs submitted to the Appellate Division, and for approximately 15 minutes, orally argued this specific point to the panel on February 4th 1998. And, the Appellate Division recognized this in their decision dated July 14th 1998. [Thompson id].

31. The economic value of this new judgment is worth well over $ 500,000. As such, the order of the Appellate Division dated July 14th 1998, which was entered on July 16th 1998, drastically changed the law of the case by rewarding ownership of the property to Thompson. She was at all times warned that the result could be far worst; was offered a good settlement; but declined this and directed both Mr. Chovnick and myself to proceed with the appeal. The result was a modest success and a "wash". [see affidavit of Mr. Chovnick dated December 15th 1999, attached hereto as exhibit "C"].

32. Furthermore, the reason that the stipulation of March 10th 1997, between Dr. Felix and 490 West End Ave. was never consented to, ["TR" 1196-1201] was that to do so, would admit that 490 West End Ave. owned the subject premises at all times. This would include the rights to the rent of the subject premises from June 1996- September of 1997. [see Affirmation of Stan Chovnick Esq. dated May 8th 1997 at "TR" 1247-1250; also affirmation of undersigned dated May 8th 1997 at 1253-1256]. The "stipulation" of March 10th 1997 made this crystal clear. ["TR" 1196-1201]. If that were the case, then 490 West End Ave. would be entitled to the use and occupancy to those premises. That comes to about $47,500.00. [see affidavit of Laurie Thompson dated May 8th 1997 at "TR" 1251-1252].

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33. Without admitting to this stipulation, Ms. Thompson can now argue that she has at all times possessed and or owned apartment 1(c). This includes the time that Dr. Felix had subleased the apartment and was on a rent strike. The strike commenced in June of 1996, and ended when Felix departed on September 30th 1997. Had Thompson consented to the stipulation of March 10th 1997, she would not have been able to appeal the issue of possession. It would now be in the possession of 490 West End Ave., or a bona fide purchaser, and 490 West End Ave., would be entitled to the use and occupancy of the sub-tenant Dr. Felix from June 1996-September 30th 1997.

34. Therefore, the new judgment rendered by the Appellate Division on July 14th 1998, changed ownership to Ms. Thompson, as a result of her never being in violation of the proprietary lease. This is largely as a result of her seeking to cure the violation as of December 31st 1996, which was raised in the motion submitted to the clerk's office on January 6th 1997. She can now claim that 490 West End Ave. had no legal or contractual right to negotiate with the sublessee. The past use and occupancy of $47,500.00, coupled with the ownership to the valuable property [$750,000.00], are "fruits" of the appeal. They are economic benefits that fall within "chargeable liens".

35. Ms. Thompson knew at all times that the trial judge was going to award possession of the premises to 490 West End Ave. [see affidavits of May 8th 1997 of Stan Chovnick; Richard Zelma; and Laurie Thompson "TR" 1247-1256]. The only way she was going to retain possession in 1998, was if she would settle the case and have Dr. Felix continue to occupy the premises and have him in essence pay all future rent to 490 West End Ave. She rejected this offer vehemently!! [see affidavit of Chovnick dated December 15th 1999 attached hereto as exhibit "C"; see affidavit of Ms.

Thompson dated May 5th 1997 "TR" 1241-1242]. She rejected this on about 5 separate occasions. [see exhibit "C" & "G"]. That these points were made to Ms. Thompson in full harmony of **E-C 7-8**. [see exhibit "N"]. Ms. Thompson was given numerous possible offers to settle which she declined [see directives of Thompson dated May 4th 1999 attached hereto as exhibit "O"]. The bottom line is that it was Ms. Thompson's final decision to appeal the case notwithstanding the possibility that possession of the premises may be lost. [see correspondence dated May 9th 1997 attached as exhibit "N" and Thompson's directive of May 4th 1997 attached as exhibit "O"].

Further Assurances.
Never Objected to time on Appeal.
The time is documented.
Admission by Thompson.

36. Ms. Thompson knew that I was working a great deal on the appeal. She also knew that the time was necessary as the issues were not only "unsold shares" but the ownership to her valuable property. During the time that I was working in what was in essence a 12 hour day on a monthly basis, she had called me and told me not to worry, and that I will be paid. I informed her that this is quite expensive and she assured me on a dozen occasions that I will be paid in full. In order to make certain of this, I prepared a bill and served it on her on November 15th 1997. I specifically made clear in my bill that this was being done to make certain that there are no disagreements in the future. [see bill of November 15th, attached as exhibit "A"]. She immediately paid me $10,000.00. She informed me not to worry and that I will be paid when her business gets paid the next year. I had absolutely no reason to have any concern with, as Ms. Thompson had paid me beforehand; and her

business receipts averaged over $ 500,000.00 per year. ["TR" 1083 -- 1991 $ 414,150.00; "TR" 1099-- 1992 $610,020.00]. And she gave me part payment without any conditions imposed. So, when Ms. Thompson's check bounced and she apologized to me 6-10 times on one evening, I accepted her apology and informed her that another bill will be forthcoming. The second check was deposited a day or two after I had orally argued the matter to the Appellate Division. This was in conjunction with the second and final bill that was sent to Ms. Thompson. [see exhibit "B"]. Once again, the $ 10,000.00 was credited to the stated account. The stated account was binding and enforceable as a promissory note. The contract could never be revoked once performance was complete. [please see memorandum of law dated December 20th 1999 supporting this answer **Points C - E**]. I do not have a copy of the second check [# 166], but I am 100% certain that there is no condition on that check, as I would never have deposited it had there been one. The payment was at all times only part-payment and that alone. She fully knew this on November 15th 1997, when she issued me a post dated check for November 25th, and knew this thereafter in the first week of January in 1998, when she issued me a second check after the first one was returned for insufficient funds.

37. My time from December 11th 1996 to May 21st 1997 was 289 hours. [see exhibit" "F' time sheets]. This was corroborated by Mr. Chovnick in his correspondence dated June 4th 1998. [see exhibit "G"].

38. My time from August 8th 1997 - November 14th 1997 was 371 hours. [see bill dated November 15th 1997 attached hereto as exhibit "A"; and time sheets from August 8th -November 10th attached hereto as exhibit "D"]. And my time from November 14th 1997 to February 5th 1998, is over 202 hours. [see exhibit "B" and see exhibit "D" time

sheets].

39. My time from May 21st 1997-August 8th 1997, was approximately 160 hours. [Time sheets attached as exhibit "H"]. This was billed at $ 200.00 per hour. The check for $ 37,000.00 was for my time from May 21st 1997-August 8th 1997, together for the services of George Zelma. [see exhibit "I"].

40. There are 808 hours of billed time that were not paid for when one includes the time from April of 1998-January of 1999. [see exhibit "K" demonstrating 216 hours of hours from April of 1998-January of 1999 including 129 hours for motion for leave to appeal to Court of Appeal]. The attorney client relationship concluded on or about December 29th 1998. [see exhibit "P].

41. It is to be noted, that by the very admission made by Ms. Thompson in her 'complaint' to this commission dated October 6th 1999, that the retainer fee was for $125.00 per hour, nullifies any "complaint". Without conceding this point, but for arguments sake, let us assume that the fee was $125.00. There are 808+ hours that have not been paid for by Ms. Thompson. At the rate of $125.00 per hour, this amounts to $101,000.00. Of this, $74,000.00 and or 579 hours of this was due on February 6th 1998. The primary interest rate of 7% is about $ 12,000.00. Therefore, $ 86,000.00 was due on February 6th 1998. The 129 hours for the appeal was due on October 27th 1998. That is approximately $16,200.00. The interest rate on this is approximately $1,600.00. Therefore, $18,800.00 is owed for that time. The remaining 80 hours comes to a total of $10,000.00 with the interest being approximately $750.00. The total amount due is approximately $115,000.00. Therefore, pursuant to the very admission of Ms. Thompson, there is no disputing that the attorneys fees were due before January 31st 1999. The discussion of quantum meruit,

although not at issue as there was a binding contract with mutual obligations, is discussed in ft. note 1 page 6 of the memorandum dated December 20th 1999.

42. Ms. Thompson never for one solitary second, challenged the time for which I had spent on the appellate process. She never conditioned the payment of the bill of November 15th 1997. She fully had several opportunities to do so for a very long period of time. She knew that it was being credited with a final balance to be due. She knew that the case was very complex and difficult. She knew that more than unsold shares were at issue, as she lost possession to the premises that she had purchased in 1992 for $200,000.00. She declined and rejected a few good offers to settle the matter.

43. The bottom line is that she wanted to win the entire case. She rejected many good offers which would have reduced the costs of litigation significantly. She was informed of the risks and costs. It was her decision and her decision alone to appeal the matter, with full knowledge of the possible losses and the costs. She was very determined and was willing to take the risk.

Conclusion

For all of these reasons, together with the points in the memorandum of law attached hereto, it is requested that the complaint be dismissed.

Dated: December 20th 1999:

Richard Zelma

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Memorandum of Law

A: Oral contract fulfills requirement set forth by Court of Appeal. The oral retainer agreement of December 11th 1996 is enforceable. It is not proscribed by GOL 5-701 [a] [1] or [a] [10].

What is of immediate import is that a service contract between an attorney and client that does not involve a matrimonial dispute, and or, is not a personal injury contingent matter, can be orally made. [see advisory opinion of New York State Bar Association, Ms. Kathleen Baxter, dated November 12th 1998, attached to answering affidavit dated December 20th 1999, as exhibit "M ", and citing DR 2-106 (C); and (D); EC 2-19; all exhibits hereinafter referred to accompany the affidavit dated December 20th 1999]. Indeed, GOL 5-701 [a] [10], specifically makes clear that it "does not apply to a contract to pay compensation to an auctioneer, an attorneys at law, or a duly licensed real estate broker or real estate salesman." This immediately removes the retainer agreement in the case at hand from the domain of the statute of frauds. [5-701 [a] [10]].

Furthermore, it is of significant import that Mr. Chovnick; Richard Zelma; and Laurie Thompson; on December 11th 1996, at the office of Mr. Chovnick, made clear that Mr. Chovnick would be in complete charge of the settlement negotiations with the adverse party, and that settling the matter was the number one priority. This obviously could take place in a matter of weeks from December 11th 1996, and almost came about in May of 1997. [see affidavit of Stan Chovnick dated December 15th 1999 attached as exhibit "C"; and Chovnick's

correspondence to Thompson dated June 4th 1998 attached as exhibit "G"]. Furthermore, a motion for a new trial and or to vacate the decision of November 22nd 1996, which was entered on December 20th 1996, was timely made on January 6th 1997. And, on December 11th 1996, it was possible that if an appeal was necessary it could be perfected; argued and decided, within one year of that date. Lastly, both Ms. Thompson and the attorneys could terminate the relationship at will therefore, the case could have very easily have concluded within 1 year. The oral retainer agreement was without question binding and enforceable under GOL 5-701 [a] [1]. [see i.e. **Cron v Hargo Fabrics**, 91 NY 2d 362, 370 (1998)].

When there is an ongoing employer/employee relationship, and any commission is directly attributable to that time period, the statute of frauds does not apply.

In *Cron*, the employee/employer relationship was terminable at will by either party. The issue was whether the oral agreement was enforceable by virtue that the commissions in dispute could only be calculated after the calendar year was over. The Court of Appeal concluded that as a matter of law, the oral contract was enforceable and that the proscription of GOL 5-701 did not apply.

> Court: " 'If the terms of the contract here had included an event which *might end* the contractual relationship of the parties within a year, defendants possible liability beyond that time would not bring the contract within the statute' " **Cron** at 370 quoting Martocci, 301 NY 57 at 62)' " "*From these precedents, we hold that when the employment relationship is terminable within a year and the measure of compensation* has become fixed and earned

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> during the same period, the sole obligation to calculate such compensation will not bring the contract within the one-year proscription of the Statute of Frauds." [Cron id. at 370].

This is fully consistent with the Court of Appeals prior decision. [see **North Shore Bottling Co., v C. Schmidt & Sons**, 22 N.Y. 2d 171, (1968)]. As that court found:

> Court: " The statute only applies to agreements which are, by express stipulation, not to be performed within a year. It does not apply to an agreement which appears by its terms to be capable of performance within the year; nor to cases in which the performance of the agreement depends upon a contingency which may or may not happen within the year.' " [Emphasis added **North Shore, id.** at 176, quoting **Dresser v Dresser**, 35 Barb. 573, 577 (1862)].

The law is now crystal clear that almost every employer/employee relationship that can be terminated at will need not be in writing. [see i.e. **Sabetay v Sterling Drug,** 69 N.Y. 2d 329, 333 (1987); **Rule v Brine**, 85 F. 3d. 1002, at 1013 (CA2) (1996)].

This includes the payment for services rendered within the year even if only computed after the year is terminated [see i.e. **Cron** supra. at 369 "adapting" the rational of **Rifkind v Web IV Music**, 67 Misc 2d. 26, 34 (1971)].

The oral retainer agreement of December 11th 1996 was enforceable and binding upon Ms. Thompson.

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B. The oral agreement of December 11th 1996 compelled the undersigned to furnish the services to perfect and argue the appeal. It is corroborated by extrinsic evidence. There was viable consideration. The contract imposed reciprocal mutual obligations that relate back to December 11th 1996. The contract was enforceable not illusory.

The retainer agreement at bar was bilateral as it embraced the exchange of duties and or obligations. They were reciprocal to one another. The promise for professional services from Mr. Chovnick and myself were exchanged for the payment of fees and or the tender of payment by way of checks. The "bilateral contract" was "binding" upon" both parties. [see and cf. i.e. **Drennan v Star Paving Company**, 51 Cal. 2d. 409, at 413; 333 P.2d 757, at 759 (1958); Traynor J.]. The terms to the contract were distinct. The parties on December 11th 1996, made certain to inform Ms. Thompson, that Mr. Chovnick would primarily attempt to settle the case, and that the primary role of the undersigned was to perfect the appeal if necessary. [see exhibit "C" & "G" and see affidavit dated December 20th 1999]. In exchange for the services to be performed, it was agreed that $300.00 per hour would be the monetary payment for such services. This bilateral agreement was fully agreed to by the conduct of all parties throughout the entire relevant period including the period of time when the judgment was being entered; when the attempts to cure the violations were made to the lower court from December 1996-August of 1997; to the time that the record was being reviewed for purposes of settling it and perfecting the appeal; to the time of writing the main brief to the Appellate Division; writing the

opposition papers to the motion to vacate the appeal; writing the reply brief; and arguing the matter to the panel on February 4th 1998. The retainer agreement was acknowledged and confirmed by George Zelma who took part in the matter in the summer of 1997. [see ¶ 16 & 21 to affidavit dated December 20th 1999 and exhibit "I" attached thereto].

The consideration of my services binds the promisor to pay as agreed. This was admitted to by Thompson in her part/payment. [see points C & D **infra**]. In similar fashion, an oral agreement was found to be enforceable by the Appellate Division. [**Grundt v Shenk**, 222 A.D. 82, (1927) (Second Dep't)]. That case concerned itself with a person [Mr. Grundt], whose services were rendered to an affluent real estate owner, [Mr. Shenk], who was in need of assistance by virtue of his plight in an investigation. [**id**. at 85]. The bottom line is that the Appellate Division reversed the trial court's dismissal of the case. The lower court had found that there was no consideration bestowed to Grundt. [**id**. at 84]. The Appellate Division concluded otherwise, and in finding an enforceable oral contract, it relied on important principles of law rendered by our Court of Appeals as they relate to written contracts.

> Court: "In determining whether the contract was made, the jury's verdict, based in my opinion upon sufficient evidence, answers that proposition. In determining its construction the opinion of Judge Martin in **Gillet v Bank of America** (160 NY 549, 555) is of great aid: " In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the

surrounding circumstances, the occasion and apparent object of the parties, to determine the meaning and intent of the language employed. Indeed, the great object, and practically the only foundation of rules for the construction of contracts is to arrive at the intention of the parties. This is the most conspicuous and far reaching rule, and involves the nature of the instrument, the condition of the parties and the objects which they had in view, and when the intent is thus ascertained, it is to be effectuated unless forbidden by law. Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent Purpose which the parties sought to accomplish.'" [**Grundt id**, at 88].

Furthermore, the panel in **Grundt** set forth the following crucial rules:

"A promise that was originally too indefinite, may by performance become definite and as the other party to the bargain must be regarded as continuously assenting to receive such performance in return for his own promise, a valid unilateral contract arises on receipt of such performance."
[id. at 89 quoting 1 Williston Cont. ¶ 106].

"In **Miller v McKenzie** (95 N.Y. 575, 579) Judge Earl, writing for a unanimous court, cites and quotes from numerous cases in

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support of the following view of the law: " Here the future services were rendered, and there is no authority which we are bound to respect which holds that in such a case, the future services, in order to furnish a consideration, must have been rendered under a contract binding the promise to render them. **If** the plaintiff was not, at the time she made the promise, **bound** to render the future services, her subsequent rendition of them furnished the consideration to uphold the note, and makes the consideration of the note in that respect just as good and valid as if she had made a binding promise to render them.'"

A late expression upon the subject of mutuality of obligation in contracts is that of Judge Vann in **Grossman v Schenker** (206 N.Y. 466, 468), viz: " Even when the obligation of a unilateral promise is suspended for want of mutuality at its inception, still, upon performance by the promisee a consideration arises **which relates back to the making of the promise, and it becomes obligatory.'" [Grundt, id.** at 89].

These rules of law are crucial to the case at bar. The undersigned was at all times bound to appeal the underlying matter. This was not a "unilateral contract". The performance did not create the consideration that binds the offeror. The undersigned could not escape the duty to perfect the appeal. This was the professional duty of the appellate attorney, by virtue of the consent to change attorneys on December 11th 1996, and the oral retainer agreements and

acknowledgments thereafter. This was the agreement from the outset as witnessed by Stan Chovnick. This was further witnessed by George Zelma in his office on or about July 23rd 1997. He only started to review the case on July 25th, after Ms. Thompson made payment on or about July 24th 1997. [see exhibit "I" accompanying the affidavit of December 20th 1999]. Therefore, the rule enunciated in *Grossman v Schenker*, and how *performance "relates back to the making the oral promises"*, is pertinent to the present case. It is not a quantum meruit matter.

The rules relied upon in Grondt are on point. There was at all times a 'mutual obligation' for the appellate services, as they were to be fully paid for by Ms. Thompson. The agreed to sum for the writing of the brief and for oral argument was $ 300.00 per hour. This was obligatory. The services were not rendered to create the consideration as discussed in *Miller v McKenzie*. The contract was binding, predicated upon mutual obligations. It was not illusory. The standard of proof in establishing an oral retainer agreement is by the "preponderance of evidence". [**McKeon v Van Slyck**, 223 N.Y. 392, at 397 (1918)].

Moreover, the promises made by Thompson from November 1997-April of 1998, is fully supported by part-payment. If there is any "extrinsic evidence" supporting the promise, it cannot be ignored as a matter of law. [see **Cobble Hill v Henry & Warren** 74 N.Y. 2d 475, at 483 (1989); citing 1 Williston, Contracts ¶ 47, at 153-156 (3d ed. 1957)]. The concept that the promise should be "rejected on that ground is at best a last resort." [**Cohen & Sons v Lurie Woolen Co.**, 232 N.Y. 112, at 114, (1921) (Cardozo J.) cited by Cobble Hill supra at 483]. At bar, there is ample documentary evidence, before and during the course of perfecting the appeal, to support the full payment of the balance due. [id and see infra Point D, account stated citing

Spellman; Lockwood].

"Contract law has progressed and evolved sounder principles since the days of ritualistic and formalistic sealed instrument requirements. Thus, these rules, placing the emphasis on intention rather than form, are sensible and reasonable." [**V'Soske v Barwich**, 404 F. 2d 495, at 499 (CA2) (1968) also see **May Metropolitan Corp., v May Oil Burner Corp**., 290 N.Y. 260,49 N.E. 2d 13 (1943); **Biothermal Process Corp., v Cohu & Co**., 119 N.Y.S. 2d 158 (1953), aff'd., 308 N.Y. 689 (1954)].

The principle of mutuality of obligation is present. It was mutual from its outset. There was a binding contract.[9]

The Appellate Division in Grundt made clear that the promise to Shenk was not "illusory". The Court stated that "we have here the undisputed fact and, indeed, the concession that the services contemplated by the agreement have been fully and fairly performed." [id. at 88 & 89]. And the panel in Grundt made clear that it was relying on **Mckeon v Van Slyck**, [223 N. Y. 392 (1918)], and **Matter of Hinsch**. [209 A.D. 828 (1924), affirmed 239 N.Y. 519 (1924)].

Grundt; Hinsch; and Van Slyck; upheld oral contracts. The oral retainer agreement of December 11th

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[9] ADMISSION BY COMPLAINANT. [see ¶ 41 in answering affidavit dated December 20th 1999] The concept of quantum meruit is not germane, as there was a legitimate binding contract at all times. However, this doctrine should be raised in conjunction with the breach of contract point. [see **Rule v Brine**, 85 F. 2d 1002. at 1011 citing **Bradkin v Leverton**. 26 N.Y. 2d 192. 196 (1970); also see **Drennan v Star Paving**, 51 C. 2d 409. 413-417; 333 P. 2d 757. 759-761. (1958) Traynor J.].

1996, was reiterated by Thompson on or about July 23rd 1997, and it was verbally reiterated on 10 occasions thereafter. Part payment of the stated account with no condition imposed, fully supports the oral contract. The final balance due is conclusive. [see Point D infra].

C. The part payment is not an accord and satisfaction as a matter of law.

A third important issue is whether there was an accord and satisfaction when Thompson rendered two checks in the amount of $10,000.00 in the fall and winter of 1997-98. [see exhibit "B" and "J"].

The first check was dated November 25th 1997. [see exhibit "J "to affidavit dated December 20th 1999]. Clearly, as one can see, there was no condition and or part-payment that was sent in connection with that check. As the accompanying affidavit sets out, the promise of full payment of the balance due, and for further time to make payment, was made on numerous occasions. [see affidavit dated December 20th 1999, ¶ 36]. The bill of November 15th 1997 was sent to Ms. Thompson by certified mail. It included the deduction of $ 10,000.00 with the balance due. The correspondence made clear that " I must sent this bill to you and be on the record so that there will be no misunderstanding. I am relying on your assurances and must protect myself." [see ¶ 9 of affidavit dated December 20th 1999, and stated account dated November 15th 1997, attached thereto as exhibit " A"].

The only response to this bill was the payment of $10,000.00. This was a part-payment. There was never any response to the bill of November 15th 1997, nor the bill dated February 6th 1998. [see exhibit B" to affidavit]. The

latter was sent two days after the oral argument of February 4th. The work was complete; the matter submitted for the court's review; and the stated account with the balance due served. [also see point D & E infra].

Had Thompson sent the creditor some form of correspondence, and or, conditioned the part payment of the bill by stating " payment in full", or" in full satisfaction", there would be an argument on her behalf that if the creditor cashed the check, without further statement, this would be an " accord and satisfaction". But without these conditions to be found anywhere in the record, and with Thompson having two separate opportunities to mark the checks in such a manner as a result of her passing a bad check the first time around, the doctrine of accord and satisfaction must fail as a matter of law. This was the ruling in the landmark case rendered by the Court of Appeal on the subject as it pertained to unliquidated debts. see **Fuller v Kemp**, 113 N.Y. 231 (1890)].

In *Fuller,* the Court of Appeal was faced with the facts that a doctor had billed his patient $ 670.00 for his services. The patient then sent the doctor a check in the amount of $ 400.00 and stated that this was" in full satisfaction" and "fix a figure which would be entirely just to both parties." **[Fuller id**. at 235]. The patient had invited a reply from the doctor.

The doctor then deposited the check and sent a new bill crediting the $ 670.00 with the payment of $ 400.00. [id. at 235]. The patient wrote back calling the attention to the express condition ["payment in full" **id**. at 235]. The patient did not "recognize the plaintiff's right to retain the amount so offered, and to repudiate the condition of the offer." The patient mandated that the doctor" either keep the money upon the condition named, or return it to him by first class mail." [**id**. at 234]. The doctor did not return the check but instead,

remained silent and started the case for the balance. [**id.** Fuller,. at 235].

The Court of Appeal then rendered its very important rules on accord and satisfaction.

> Court: The plaintiff accordingly sent his bill, in which he expressed his own views as to the amount of compensation which he ought to have. Had the defendant not responded to the bill of the plaintiff, this would in time have become an account stated, which a species of implied contract, and the law would have presumed a promise on his part to pay the sum charged on the bill. [**Fuller, emphasis added** at 236]. But the defendant, while not disputing the rendition of services, objected to the amount of the plaintiff's charges and declined to pay the bill rendered, but sent a check for $400, stating that it was to be in full satisfaction of the plaintiff's claim, and in substance expressing hope that the plaintiff, upon reflection, agree with him that it was the reasonable value of his services. The plaintiff received and used the check, and had he remained silent it would have been conclusively presumed that he assented to the defendant's proposition and had agreed to receive and had received the sum tendered in discharge of his debt. But the tenor of the of the defendant's letter was such as to invite a reply, and while the plaintiff kept the check, he sent another bill for the same amount, upon which he credited the amount of the check as a part payment, leaving a balance, which he

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> still claimed to be due. The just inference to be drawn from this communication was that he declined to accept the check in full payment, but had appropriated it as a partial payment of his claim, and the defendant undoubtedly so understood it. Had he then remained silent it might have been presumed that he assented to the use of which the plaintiff had made of the check, and in time he would have become bound to pay the balance as upon an account stated. But the defendant at once notified the plaintiff that he had sent the check upon condition that it should be received in full payment of his bill, and that he could not assent to any other application of the money, and that the plaintiff must either keep it upon that condition or immediately return it. [**Fuller at** 236-237].

Therefore, it is crucial to point out the *three scenarios* that the Court of Appeal set out. The patient had initially sent a check marked in full satisfaction. Had the doctor accepted this and remained silent, this would be an accord and satisfaction. But the doctor deposited the check and responded and claimed that this was not sufficient. Here lies the second phase. Had the defendant remained silent, this would be an admission that the balance due was proper and this would be an account stated. But, the defendant responded, and demanded that the doctor either accept the final term of "full satisfaction" and or return the money. The doctor in phase #3 did nothing. As a result, his silence led to the conclusion that he was bound to the accord and satisfaction. He could not raise this by subsequently filing a complaint.

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The silence of the parties is crucial to the question of whether one party assented to another. In the case at bar, this is conclusive. The first bill was sent and immediately there was silence and part payment on the part of Thompson. There was no condition imposed. With the silence and no condition, the assumption is that Thompson had agreed to the balance due as the part-payment was immediately deducted and or credited and billed. The check thereafter bounced, and 6 weeks after being served with the stated account, the client issues a second check with no objection whatsoever. She had every opportunity to impose a condition. She fully acquiesced to the stated account and the fact that the amount of $10,000.00 was being deducted. She was being billed for the balance due. Thompson readily accepted this by her silence and her signing the second check. This one did clear. Again, no "payment in full".

Thompson has remained silent three times. First, when she obtains the first bill and makes part payment. Second, when she receives the account stated with the balance due and makes a second payment with no condition. And third, when she receives the February 6th 1998 final bill. And, as the cases on accounts stated make clear, this type of silence and or inaction raises a conclusive presumption that the matter is a stated account that cannot be opened. [see Point D citing Spellman; Lockwood; and Knickerbocker; infra].

The import of **Fuller** was set forth in 1903 by the First Department. [**Mack v Miller**, 87 A.D. 359 (1903)]. Mack concerned itself with an attorney and his client. The attorney had concluded his work and sent a bill on January 31st 1900, to his client, seeking a payment anywhere between $2,500-$5,000. [**Mack, id** at 361]. The client then sent a check for $250.00 with a letter stating that he "thinks this pays you well for what you have done." **id** at 361.

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The attorney immediately sent a response letter informing his client that he will be "glad to apply on account of my bill for services rendered, as set forth in my letter of January 31st 1900. Under no circumstances could I accept the check in the above amount in full settlement of my bill." [emphasis added, id. at 362]. The plaintiff attorney, two days afterwards without hearing from his client, deposited the check! He then proceeded to court for the account balance that was due! [**id**. at 362].

The Appellate Division in **Mack,** went over the *Fuller* case and the three or four types of scenarios that the Court had discussed.

The Appellate Court stated in relevant part as follows:

> Court: We have, therefore, a clear expression by the court of last resort that the limit of the doctrine of accord and satisfaction has been reached and is not further to be extended in favor of defendants relying thereon. In the present case is found the first supposition which the court announced in *Fuller* v *Kemp* (supra), viz., that the first letter invited a reply and the check was used. Had the transaction then ended and the plaintiff remained silent it would have been presumed that he accepted the check as payment in full. In the case now before us the letter invited a reply. The plaintiff appropriated the check and replied thereto, stating the application which he had made of it, and that he refused to receive it as payment in full. The defendant *remained silent* and thereby placed himself in the third supposed position announced in the

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> *Fuller* case, *which indicated that he acquiesced in the appropriation* and application which plaintiff had made of the money. [Mack, id. at 364-365].
>
> Consequently, within the doctrine of that case there was *no* accord and satisfaction, but, on the contrary, there was an acquiescence by the defendant in the disposition which was made of the payment, in consequence of which there became *no binding accord and satisfaction."* [*Mack id.* at 365].

[also see **Schuller v Robison,** 139 A.D. 97, at 107, (First Dep't), 1910; & **Laroe v Sugar Loaf**, 180 N.Y. 367, at 372-373 (1905); also see **Gaston & Co., v Storch**, 253 N. Y. 68, (1930) Cardozo J., condition subsequent imposed on release nullified accord and satisfaction; **Bowery Bay Building Co. v Rossiter, MacGovern & Co.**, 118 A.D. 652, 653-654 (1906); **Rehill v Rehill,** 306 N.Y. 126, (1953); Cf; **Schnell v Perlman,** 238 N. Y. 362 (1924), proper accord and satisfaction on front and back of check accompanied by correspondence].

The rules set forth in **Fuller** and fully adhered to and explained by the Appellate Court a few years later in Mack, are very germane to the case at bar.

It is of import to point out that if the attorney in the case at bar had known that the checks for $10,000.00 imposed a condition in the form of a settlement, "it may well be that it would have retransmitted the draft and or return the proceeds." [**Schuller v Robison**, 139 A.D. 2d 97, 107, (First Dept) (1910)]. This knowledge cannot be imputed.

Nor can a condition be removed or changed retroactively. The condition cannot be stricken by "erasing"

it and depositing the check.. [see i.e. **G. & L. Realty Co. v Friedman**, 173 N.Y.S. 376 (1919); also see **John J.Daly Iron, Steel & Metal Co., v United States Metal and Mfg. Co.,** 137 N.Y.S. 150 (1912)].

This erasing technique is similar to an "ex post facto" method of depositing a check with a condition and thereafter claiming the balance due. This was found by the Court of Appeal to be without merit in 1896. [see **Nassoiy v Tomlinson**, 148 N.Y. 326, at 331 (1896)]. The court in Nassoiy relied on the legal test of *Fuller*. [see **Nassoiy, id.** at 332].

Despite this knowledge, the check of $10,000.00 [check # 8511 see exhibit "J" to affidavit of December 20th 1999], was returned for insufficient funds on or about January 2nd 1998. As the accompanying affidavit of December 20th 1999 set forth, Ms Thompson thereby called and apologized 6-10 times in the course of one evening stating that this never has happened to her. [see 136]. She immediately issued a second check in the sum of $ 10,00.00. [check #166; see exhibit "B" to December 20th affidavit]. Once again, there was never any letter accompanying this check. Nothing on this check suggests or implies that it is a "final payment" or in " full satisfaction". Absolutely nothing.

The evidence in the case at bar cannot be contradicted. As a matter of law, this case if 100% stronger than *Mack* v *Miller*. [supra]. There is no suggestion whatsoever in any document in rendering two checks, and with the client fully aware that the amount was being credited to the stated account, that the check was sent to satisfy the full balance. Indeed, the antithesis holds to be accurate. Ms. Thompson had full knowledge when she issued the second check that the first one was being used on credit and or appropriated to the full balance. Ms. Thompson's silence, pursuant to the *Fuller* doctrine, has fully" acquiesced" and or

" assented" to the "account stated". **[Fuller supra** at 236-237; **Mack supra** at 364-356].

"Therefore, the acceptance of the defendant's check was only acceptance of a payment on account and not an accord and satisfaction of the entire indebtedness." [see **Hempstead Bus Corporation v Cardcards, Inc.** 169 N. Y.S. 2d. 823, 825 (1957)].

The facts at hand do not come close to the facts of another important case entitled *Schnell.* Any suggestion to the contrary is without merit. [cf. **Schnell v Perlman**, 238 N.Y. 362, 369-370 (1924)]. And it is well known that the accord and satisfaction doctrine as set forth in *Fuller,* are not to be expanded or "extended" [see **Eames Vacuum Brake Co., v Prosser**, 157 N.Y. 289, at 299-300 (1898), cited by Appellate Court in Mack supra, at 364].

And these rules not only refute the possibility of an accord and satisfaction, but they fully support that the "stated accounts" served on November 15th 1997 and February 6th 1998, are conclusive; binding; and were admitted to by Thompson. [also see **infra point** D citing **Spellman v Muehfeld,** 166 N.Y. 245 (1901); & [**Lockwood v Thorns,** 11 N.Y. 170, (1854)].

D. The stated account was due as of February 6th 1998. It is conclusive; binding and an admission. It is the equivalent to a promissory note.

"There is no doubt that an account stated may sometimes result from the retention of accounts current without objection. **[Newburger - Morris Co., v Talcott**, 219 N.Y. 505, at 511 (1916) Cardozo, J. citing **Knickerbocker v Gould**, 115 N. Y. 245 (1889); Spellman v Muehfeld, 166 N.Y. 245 (1901)].

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The leading cases rendered throughout the 19th century with respect to accounts stated, rely upon the leading case issued by Judge Parker. [**Lockwood v Thorns**, 11 N.Y. 170, (1854)]. The court in relevant part set forth the standard of review as follows:

> Court; '" It is said to be a general rule, that where an account is made up and rendered, he who receives it is bound to examine the same, or to procure some one to examine it for him; if he admits it to be correct, it becomes a stated account, and is binding on both parties His silence will be construed into an acquiescence in its justness, and he will be bound by it, as if it were a stated account." Lockwood id. at 173 citation omitted].

In *Lockwood I,* the Court was faced with a record that revealed that the debtor remained silent for 9 months with regard to the bill that was submitted to them for payment. They were further faced with a partial payment of the account. [id. at 174]. The Court found as follows:

> Court: Here is then affirmative, and I think, **conclusive** evidence that, with the account before them, in which, among other items, the deduction for loss of weight was particularly stated, the plaintiffs agreed to it as a stated account, by drawing for and receiving the precise balance admitted." [id. at 174]
>
> Court: We are not without authority, in deducing such a legal assent from the act of

> the plaintiffs. This precise question arose in *Tolan* v *Spague* (12 Peters 300-04) and Mr. Justice Barbour, in giving the opinion of the court,-- said-- " We agree, that the mere rendering an account does not make it a stated one; but that if the other party receives the account, admits the correctness of the items, claims the balance, *or offers to pay it,* as it may be in his favor or against him, then it becomes a stated account. The plaintiff having received it, having made no complaints to the items or the balance, but on the contrary, having claimed that balance, thereby adapted it, and by his own act treated it as a stated account. " [see Lockwood v Thorne, 11 N. Y. 170, at 174- 175 (1854)].

In the case at hand, there was a part payment and complete acquiescence to the bill and appropriation of this amount leaving a final balance due. This was done on two occasions. Thompson's repeated silence on the bills together with her part-payment is deemed to be an admission to a stated account. [see point C supra, citing **Fuller v Keller**, 113 N.Y. 231, supra, at 236-237 (1890) & **Mack v Miller**, supra, 87 A.D. 359, at 364- 365 (1903)].

In a second case of import on the subject, Judge Parker reiterated the strong principles of stated accounts and the standard of evidence. [**Spellman v Muehlfeld**, 166 N. Y. 245 (1901)]. The Court in relevant part set forth as follows:

> Court: " In *Lockwood* v *Thorne* (11 N.Y. 170) Judge Parker writing *for* the court asserted the general rule to be that where an account

> showing a balance is rendered, the party receiving it is bound within a reasonable time to examine it and object if he dispute its correctness; if he omit to do so he will be deemed from his silence to have acquiesced, and will be bound by it as an account stated in absence of proof of fraud or mistake. In such a case, the assent is not expressed, but it is implied from the fact of a retention of the account for a period of time without objection to any of the items Therefore, while the proposition is correctly laid down in *Volkening v De Graaf* (81 N.Y. 268) that ... An account stated is an account balanced and rendered, with an assent to the balance express or implied, so that the demand is essentially the same as if a *promissory note* had been given for *the balance,* ... nevertheless in proving an account stated ... it is not necessary to show an express examination of the respective demands or claims of the parties, or an express agreement to the final adjustment. All this may be implied from the circumstances." [**Spellman** id. at 248; also see **Knickerbocker v Gould**, 115 N.Y 533, at 537 (1889)].

All of these cases make clear that the surrounding circumstances demonstrating proof of service of the account stated; with no objection and or a period of silence by the debtor; coupled with the adjustments of debts with payments being made; are conclusive and binding. All of these principles apply in the present case. The rule of law is that the stated account will never be re-opened. As the **Lockwood** court made clear:

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> Court: "It is well said by Chief Justice Marshall, in Chappedelaine v Dechenaux (4 Cranch 306) , where an attempt was made to open an account stated--- " No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestions supported by doubtful or by only probable testimony.'" [Lockwood, id. at 175].

The unverified complaint of Thompson contains material misrepresentations of fact. It incorrectly sets forth the terms to the retainer agreement. It incorrectly asserts the payment of $146,000.00 in appellate attorneys fees. And it fails to address the non-payment of the stated account. Re-opening the account stated, that sets forth the time period from August 8th 1997-February 5th 1998 cannot be done by claiming that a period of time one year beforehand was questionable. [see exhibit "L" to affidavit; see exhibits "A" "B" "D" "F" & "H"].

> **E: Once full performance and part-payment were rendered on February 4th 1998, the contract could never be revoked.**

The attempt by Thompson to revoke the contract after full performance is not recognized under any principle of contract law. " Of course, there is no power of revocation after the requested act has been fully performed. A defendant who promised to pay a commission on all sales made to a person or corporation introduced by the plaintiff must continue to pay as long as any sales are made to a person who has been so introduced. The offeror has no power of termination." [emphasis added, see 1 Courbin on Contracts,

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Revised Edition by Perillo. at 2.29 ft. note 1 citing **Alexander v Capitol Paint Co.**, 136 Md. 658,111 A. 140 (1920)].

The case of *Alexander* was further cited by Williston in favor of finding an actual contract based on partial or full performance. "If however, the side of the agreement which was originally too vague for enforcement becomes definite by entire or partial performance, the other side of the agreement (or a divisible part thereof, corresponding to the performance received), though originally unenforceable, becomes binding." [emphasis added A Treatise on the Law of Contracts, by Samuel Williston, 149 page 158-159 ft. note 17 Third ed. citing **Alexander v Capitol Paint Co.** id.

The facts in *Alexander* were that up to the spring of 1914, Capital Paint could not sell its paint to Standard Oil. Capital was located in Baltimore. Frank B. Shepherd, the vice president of Capital, learned that Earle Alexander and or Leon Alexander of New York, had a personal contact with Standard Oil. As a result, Shepherd contacted Alexander in order to go through his contact in Standard Oil and "secure it as a customer." [see **Alexander v Capitol Paint Co.**, 136 Md. 658, at 661; 111 A. 140 (1920)]. Shepherd met the Alexander's and through them met Mr. Gilmore of Standard Oil. [id. at 662]. As a result of this introduction, Capitol was selling its paint to Standard Oil. [id. at 662]. The same scenario took place with Benjamin Moore Company, in that the Alexander's introduced Capitol to them and they became customers of Capitol. [id. at 662]. They did so for a ten 10% commission], "with no time limitation". id. 15 at 665-666]. As a result, there was a written and oral agreement with the Alexander's and Capital Paint Co. for commissions. [**Alexander v Capitol Paint Co.**, 136 Md. 658, at 661-663; 111 A. 140 at 142 (1920)].

Everything remained copacetic from 1914-1916. The

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written and oral contracts in essence awarded the Alexander's with 10% commission from all of the sales to these two corporations by Capitol. [id. at 664]. In 1916, Capitol was able to obtain a more secure contract from Standard Oil and as a result. they attempted to revoke the contract to pay further commissions to the Alexanders. The bottom line issue of law was whether Capitol could revoke the contract regarding commissions after full performance by the Alexanders was complete. The full performance was the introduction by the Alexander's of Capitol Paint to both Standard Oil and Benjamin Moore. Capitol Paint argued that they were entitled to revoke the contract as this was an" implied right" under the contract. The trial court found that Capitol Paint could revoke the contract with no direct notice.

The Court of Appeal reversed and found that once the performance by the Alexander's was complete and or fully performed, the contract vested and or could never be revoked. It did not matter to them that the agreement was not a "wise one". [**infra** at 668]. This decision in relevant part is set forth as follows:

> Ct: The sales to the Standard Oil Company were at first casual and occasional orders, but in 1916 the appellee secured a contract for the sale of a stated quantity of its product over a stated time. Up to that time it appears to have made the use of the appellants from time to time to aid it in placing orders, and to retain the business, but with the execution of the contract with the Standard Oil Company its relations with that company were placed on a surer footing and it no longer needed the help of the appellants. They were then told that they would be paid no more commissions on

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> sales to the Standard Oil Company." The appellants were not notified that they would not be paid further commissions on the Benjamin Moore Company business. The appellee '" just stopped'" paying them. [**Alexander id**. 136 Md. at 665,666; 111 A. 140, at 143].
>
> Ct: "The only question occurring in connection with them is whether the appellee had the power without the concurrence of the appellants to terminate their right to receive commissions under them. [Alexander, 136 Md. at 666-667; 111 A.140, 143].

The trial judge ruled that the appellee had the power to revoke the contract to pay further commissions, by either directly notifying the appellants, and or, by making new" direct contracts with such companies." **id** at 668]. This was the heart of the discussion by the Court of Appeal and the core of the reversal.

The Court of Appeal stated in relevant part as follows:

> Court: This compensation while it was indefinite in amount was definite and fixed in its relation to certain anticipated contingencies specified in the contracts. Whether the contract was a wise one, or the compensation is excessive, are questions which are not before us for determination. It is conceded that the thing which the appellants were by its terms required to do, they fully performed, and the only question is whether the appellee could escape its obligation to pay the

compensation agreed upon by merely notifying the appellants it would not pay it any longer. Unless the contract contravenes some established principle of public policy or conflicts with some constitutional provision, it is difficult to see they could do this. [id. 136 Md at 668; 111 A. 140, at 144.

Court: The appellee contends, however. that because under the literal terms of the contract the payment of the compensation provided for in it might continue as long as it continued to sell its products to the two companies, there must be an implied right in the appellee to terminate it whenever it so willed, but the cases cited in support of its contention do not support that position Those cases only state the *recognized right of the employer* to *terminate* an indefinite employment, and so escape any obligation to pay for services *to be* rendered, they do not approve the proposition that an employer can by any act of his terminate his obligation to pay for services which have *already been rendered under the contract,* at the time he terminates it. 136 Md. at 669; 111 A. 140, at 143]

Court: And while the appellee had the right to terminate the employment under either contract, *if it did not do that before the contemplated service was rendered, it could not escape its obligation to pay the compensation it had agreed to pay for it, by simply refusing to pay it.* [id. 136 Md. at 670; III A. at 145].

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> For the reasons stated we are of the opinion that the appellee could *not release* itself from its *obligation* to pay the *compensation due under the contracts* merely by notifying appellants that it would no longer pay it. [136 Md. at 670; 111 A. at 145]
>
> It is not apparent therefore, what difference it made whether the sales contracts were ... new direct'" contracts or were occasional "'orders,'" since the right of the appellants to their commissions would be the same in either case. It follows therefore that the statement in the prayer under discussion that the contracts could be *revoked* ... by the action of the defendant in notifying plaintiffs that said verbal contracts were terminated, or entering into new direct contracts with such companies, *is not a correct statement of the law.* [id. 136 Md. at 670-671; III A. at 145].

The *Alexander* case is in complete harmony with **Cron** as set forth above when discussing the statute of frauds. [see Point A above]. The employer is bound to pay for the services of the employee in an oral contract, when it is terminable at will, and when the services to be compensated are for past labor work. [**Cron v Hargo Fabrics**, 91 NY 2d 362. (1998)]. An employer cannot escape the duty to compensate for services that were already rendered, even if it can only be computed after one year. [Cron; point A, pages 1-2].

In similar fashion to both *Alexander* and *Cron,* Ms.

Thompson had the power to revoke the oral retainer agreement before February 4th 1998, and not pay me for any potential work. However, once the services to the heart of the retainer agreement were rendered, Thompson had no power to revoke the contract and avoid paying the time for the services performed and agreed upon. She was bound and or obligated to compensate for the services rendered. [**Alexander** supra, **Cron** supra, at Point A; and also see i.e. **American Motor Inns, Inc. v A. W.L. Advertising, Inc**. 253 Md. 654; 245 A. 2d 191 (1969)].

Additionally, her *silence* made on her partial payment in response to the bills dated November 15th 1997 and February 6th 1998, is an *acquiescence of the appropriation* and application made of final payment. [Mack and Fuller *supra* Point C, pages 7-11]. And, the lack of any objection to the account stated, with knowledge of it being credited to the full bill, leaving a balance due, is conclusive and binding. [Spellman and Lockwood, *supra* Point D, pages 13-14]. Further, the terms to the contract were mutually obligatory with each side of the contract to provide consideration to the other. [see Grundt *supra,* quoting, **Miller v McKenzie** and **Grossman v Schenker**, point B pages 4-5 above]. The terms were definite. [see i.e. Cobble *Hill,* supra point B; page 5]. And the evidence supports the establishment of a binding contract. [**Mckeon v Van Slyck**, *supra* page 5].

F. The contract rights vested on February 6th 1998. They are assignable.

The contractual rights that were due on February 6th 1998, are vested legal rights that are assignable. [see i.e. In re **Italian Cook Oil Co**., 190 F. 2d. 994, at 996 (1951); also see i.e. **Scarborough v Berkshire Fine Spinning Associates,** 128 F.Supp., 948 (1955); also see i.e. **McGrath**

APPENDIX F

v Rhode Island Retirement Board, 88 F. 3rd 12, 17 (1st Cir. 1996)

> **G: The Allegations contained in the unverified complaint are false. Thompson's credibility is impeached beyond repair.**

The complainant, Ms. Thompson, claims in two separate paragraphs [¶ 2 & 5], that she has paid the undersigned $146,000.00 in attorneys fees. But Ms. Thompson has " referred to no evidence substantiating either of these possibilities" and as set forth in the affidavit in the accompanying affidavit dated December 20th 1999, this is an illusion on the part of Thompson. [see **V'Soske v Barwick**, 404 F. 2d 495, at 499 (1968)]. The fact that she received an account stated close to this amount, does not permit her to claim that she paid for it. Such a material misrepresentation impeaches her credibility beyond repair. The precise figures and or attorneys fees paid are contained in the accompanying affidavit. see exhibits "A" and "B" & ¶'s 18, 19, & 22 of affidavit dated December 20th 1999].

" The fabrication of evidence raises a presumption or inference that the supposed cause of action or defense of the party guilty of fabrication is without substantial foundation." [29 Am Jur. 2d ¶ 244 p. 255 ft. note 8 citing **Nowack v Metropolitan S.R. Co.**, 166 NY 433 (1901)]. The Court of Appeal in *Nowack* set forth in relevant part as follows:

> Court: "Evidence tending to show that a party to an action tried to bribe a witness to give false testimony in his favor, *although collateral the issues,* is competent as an admission by acts and conduct *that his case is weak and* his evidence dishonest." **id** at 437].

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" Where it appears that one side there has been forgery or **fraud in some material parts of the evidence,** and they are discovered to be the contrivance of a party to the proceeding, **it affords a presumption against the whole of the evidence,** on that side of the question and has the effect of gaining a more ready admission to the evidence of the other party." id. at 437 quoting Phillips on Ev. [C & H. Notes].

In similar vein the Court of Appeal has made certain for over the past 150 years that attorneys rights for their hard work are protected. They have set forth as follows:

"The lien upon a judgment was not created by statute, but was '" a device invented by the courts for the protection of attorneys against the *knavery of their clients* by disabling their clients from *receiving* the *fruits of recoveries without* paying for the valuable services by which the recoveries were obtained." [**Fischer-Hansen v Bklyn Heights R.R. Co.**, 173 N.Y. 492, at 499 (1903), citing **Goodrich v McDonald**, 112 N.Y. 157, 163 (1889); also see **Matter of Heinsheimer**, 214 N.Y. 361, at 365 (1915) (Cardozo J.)

H. Thompson has no standing as a matter of law. There is no double liability as a matter of law.

Thompson cannot support the contention that she is entitled to receive" any fees. [see **Leon v Martinez,**

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84 N.Y. 2d 83, at 89 (1994)]. There was never any payment of the attorneys fees that were due in 1997 and 1998. Consequently, there is no " danger of compulsory double payment". [see **Williams v Ingersoll,** 89 N.Y. 508, at 525 (1882) (Earl) J.].

Conclusion

For these reasons coupled with the accompanying affidavit dated December 20th 1999, the unverified complaint dated October 6th 1999 is without merit. It is requested that this matter be dismissed.

Respectfully,

Dated: December 20th 1999:

Richard Zelma
221 West 82nd Street
New York NY 10024
(212) 724-7721

APPENDIX G

COURT OF APPEALS STATE OF NEW YORK

In re
Richard Stevens

Affidavit in Support
of Appellant
Richard Stevens

Affidavit in support of appellant
Richard Stevens

Stanley Chovnick an attorney duly licensed to practice law in the State of New York duly affirms under the penalty of perjury and pursuant to CPLR 2106 as follows:

1. Affiant and Mr. Stevens became the attorney of record in the Thompson v 490 West End Ave. matter, [index # 130664/94] on December 11th 1996. Affiant's time on this matter lasted from then to May 21st 1997, when Mr. Stevens became the attorney of record for purposes of perfecting the appeal to the Appellate Division.

Personal Knowledge of 7 incorrect statements relied upon by the referee and or Appellate Division.

2. Affiant called Peter Marc Stem Esq. on December 11th 1996, as he was the attorney of record. Indeed, this is precisely what Ms. Thompson informed me at that time. Mr. Stevens merely brought Thompson to the office to see if she would be interested in hiring the two of us as her attorney. In no fashion was Mr. Stevens the attorney of record at that time. Stevens merely knew of her legal predicament and that affiant had a real estate practice. As appellant Stevens and affiant went to law school and were in the same class, we had bumped into one another beforehand and we discussed

the possibility of his referring cases in real estate to me. [At this time, affiant incorporates by this reference as though fully set forth my correspondence of June 4th 1998; affidavit of December 15th 1999; affidavit of June 27th 2001 to referee; affidavit of October 3rd 2001 and affidavit to the hearing panel of November 15th 2001, and to the Appellate Division dated February 21st 2002]. Affiant has been informed that my affidavits were attempted to be introduced into evidence to no avail. Affiant respectfully stands by all of these affidavits and the correspondence of June 4th 1998, under the penalty of perjury.

3. On December 11th 1996, Ms. Thompson paid us at that time the amount of $ 10,000.00, and as set forth beforehand in my correspondence of June 4th 1998 to Ms. Thompson, and in my affidavits, the terms of the agreement were made clear to Ms. Thompson. The fees were to continue through the time period when Mr. Stevens was to handle the case exclusively by himself. This was specifically addressed and acknowledged by Ms. Thompson. Mr. Stevens was to handle the perfection of the appeal. The fees were for $ 300.00 per hour and during the course of litigation,

4. As made clear in my affidavits from June 27th 2001 and onward, there were only three persons at the initial meeting on December 11th 1996. Ms. Thompson; Mr. Stevens and affiant. In short: Mr. Steve Arkin was not at the meeting of December 11th 1996.

5. Affiant specifically recalls speaking with Ms. Thompson on one or more occasions concerning fees that were due and which she promptly paid for. At no time from December 11th 1996- May 21st 1997, were there any disputes as to billing statements or fees.

6. Some of these conversations concerned itself with fees while others were my attempt to convey to Ms. Thompson the settlement offers that were made by the board

at that time. It is respectfully pointed out that this was a major reason affiant was hired at that time. Both affiant and Mr. Stevens attempted to have Ms. Thompson settle the matter. We were very concerned that Ms. Thompson would lose possession of the valuable premises, as at that time the court found that she was in violation of the proprietary lease.

7. Laurie Thompson was willing to risk possession of the apartment. She was informed of the risks involved together with the costs. Any testimony or statement that suggests that affiant did not verbally warn or inform her by correspondence of May 9th 1997, that continuing to appeal the matter would risk possession of the apartment, is legally and factually incorrect.

8. Affiant was informed of these disciplinary proceedings by Mr. Stevens shortly before April 19th 2001. Mr. Stevens informed affiant that he was represented by counsel and that his name was Mr. Rick Supple Esq. Shortly thereafter, Mr. Supple called me and we discussed the case. Affiant informed him that I will testify on behalf of appellant. Affiant informed him that my time on the case was exclusively from December 11th 1996-May 21st 1997. Mr. Supple informed me at the end of this telephone conversation that he will call me as a witness to the hearing.

9. Affiant was informed by appellant Stevens, on Friday June 22nd 2001, of the urgency of my testifying the following. As a result, affiant informed Mr. Stevens that I would appear on the following Wednesday, and if not, Thursday, June 27th/June 28th. Affiant could not appear on Monday or Tuesday of that week.

10. On June 27th 2001, affiant was informed that the referee closed the hearing. Affiant immediately signed the affidavit on that date to inform the referee that affiant was ready to testify on June 28th; that affiant specifically remembers that Mr. Arkin was not at the initial meeting of

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December 11th 1996; that affiant specifically recalls that he called Mr. Stern Esq. on December 11th 1996, and affiant incorporated by reference the correspondence of June 4th 1998 and December 15th 1999, which reiterates the terms of the retainer agreement and the fact that Ms. Thompson did not want to settle this matter and fully knew of the danger that possession of the premises could be taken away. Affiant stands by all of these factual points.

11. Affiant informed the hearing panel; the referee; and the Appellate Division, that I would be very willing to appear and testify before any of them. Affiant made this clear to Mr. Supple and to Mr. Stevens at two separate periods of time.

12. Affiant respectfully urges this court to seriously review this matter and either reverse the disbarment of appellant and restore his right to practice law in the State of New York and or remand this matter for a new trial.

13. Under the circumstances, affiant respectfully submits this affidavit in support of appellants motion for leave to appeal to this court and to stay the order of May 16th 2001.

Jurat: June 13, 2002

Stan Chovnick
317 Madison Avenue
Suite 2310
New York, New York 10017

APPENDIX G

. Supreme Court of the State of New York
Appellate Division: First Department

In the Matter of the Richard Stevens [Zelma]	Affidavit in Support of Respondent

---

Stanley Chovnick an attorney duly licensed to practice law in the State of New York duly affirms under the penalty of perjury and pursuant to CPLR 2106 as follows:

1. Affiant understands the situation that respondent is involved in and respectfully points out the following to be true and accurate. My correspondence of June 4th 1998, affidavit of December 15th 1999; affidavit of June 27th 2001; affidavit of October 3rd 2001; and my last affidavit of the hearing panel of November 15th 2001, are each incorporated herein by reference as though fully set forth [attached as exhibits]

2. What is of import and what affiant informs the court is as follows:

3. Mr Arkin testified under oath and claimed to have been in my office on December 11th 1996. This is the first time affiant is actually reading the testimony of Mr. Arkin. It is set forth in pertinent part as follows:

Cross-Examination of Arkin

Stevens:	Good. You never met Stan Chovnick, correct? [TRH 209 line 24-25]
Arkin:	Yes I did.
Stevens:	You did?
Arkin:	Yes I did.
Stevens:	In his office?

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Arkin: In his office, I was there at the first meeting.
Stevens: With your mom?
Arkin: Yes.
Stevens: You were?
Arkin: Yes.
Stevens: Okay.
Bratton: This is really outside the scope of my direct.
Referee: Its outside the scope of direct, but it's within the scope of his cross-examination.
Stevens: **I didn't even remember that.** [emphasis added]
Referee: And its within the scope of that proposed affidavit of Mr. Chovnick that he wanted to introduce and it's within the scope of the $100,000.00 check that she said she issued to Mr. Chovnick at that time, and within the scope of Mr. Chovnick's letter saying that they were co-counsel. So I'll let him answer it. [TRH 210 lines 1-25]
Referee: Did your mother issue a check at that time?
Arkin: Yes.
Referee: What was the amount?
Arkin: I believe it was $10,000.
Referee: Was there a discussion at that time of an hourly rate?
Arkin: Not that I remember. [TRH 211 lines 1-9]

4. Mr Arkin was never at my office at the initial meeting. This was set forth in affiant's two affidavits of June 27th and October 3rd 2001. [attached hereto]. Mr. Arkin could never have seen Ms. Thompson issue a check of $10,000.00 on December 11th 1996, nor could he have heard any conversation on the terms of the retainer agreement entered into by Laurie Thompson on that date.

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6. And, on the point of billing, my affidavit of November 15th 2001 to the hearing panel, specifically went over the testimony of Ms. Thompson wherein she claimed that she asked repeatedly for billing statements". [enclosed] She never asked of affiant either before or after May 21st 1997, the day that she changed attorney-client status for perfecting the appeal.

8. Lastly, affiant informed Richard Stevens that my calendar was possibly open and that I try to testify on Wednesday June 27th. It was impossible for me to appear on either Monday or Tuesday the 25th or 26th. However, this was tentative. Affiant also informed Mr. Stevens that if something should come up, I would be willing to testify the following day.

9. On June 26th, affiant called respondent and informed him that something came up and that I would be available on the 28th.

10. On June 27th, Mr. Stevens informed me that the referee would not continue the matter. Affiant then immediately signed the affidavit of June 27th 2001.

11. Affiant informed the hearing panel that he would be willing to testify before them as well. Given the hardship upon respondent, if the Appellate Division desires, affiant would be available to answer any questions that she may have of affiant.

12. It is my hope that all of the information that affiant has set forth on behalf of respondent clarifies the issues and corroborates the point that Mr. Arkin was not in my office on December 11th 1996.

WHEREFORE, affiant maintains that all of my former affidavits together with my prior my correspondence to Ms. Thompson dated June 4th 1998, are accurate and true, and submits this affidavit in support of respondent.

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February 21st 2002:

Stanley Chovnick
317 Madison Ave.
Suite 2310
New York NY 10017
(212) 949-9696

Jurat: February 21, 2002

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Supreme Court of the State of New York
Appellate Division: First Department

In the Matter of the
Richard Zelma

Affidavit in Support
of Respondent

Stanley Chovnick an attorney duly licensed to practice law in the State of New York duly affirms under the penalty of perjury and pursuant to CPLR 2106 as follows:

1. That affiant incorporates herein by this reference the correspondence of June 4th 1998 sent to Laurie Thompson by the undersigned and the affidavit signed by affiant on December 15th 1999, as though fully set forth. see exhibits "A" and "B"].

2. On December 11th 1996, affiant and Richard Zelma, had a meeting with Ms. Laurie Thompson, at my office located at 317 Madison Ave. The meeting was for approximately 2 hours and was held in the conference room. Ms. Thompson was at this meeting alone. The meeting was held at my office and it was stated that my office would be the office of record. It was made clear that affiant would negotiate a settlement with the board and the undertenant whereas Mr. Zelma would be in charge of the litigation and appeal. [see i.e. correspondence dated January 15th 1997 to Mr. Steindam attached hereto as exhibit "C"].

3. Immediately after the conference, I spoke with the attorney that was handling the case at that very time, Mr. Peter Marc Stern. Ms. Thompson made clear that he was her attorney and that she wanted to proceed with this matter with new counsel.

4. That in April of 1997, there was a conference

before Judge Lehner. We had discussed the possible means of resolving the dispute with my adversaries, Rosen and Livingston and Mr. Steindam.

5. Immediately thereafter, a meeting was had between affiant Ms. Thompson and her son. Affiant does not recall his name however this is the only time that affiant ever met Laurie Thompson's son. The offer to settle was rejected.

6. On May 15th 1997, Mr. Zelma and affiant appeared before Judge Lehner. It was clear that this matter was going to a second stage, namely the appellate process. Therefore on May 21st 1997, Ms. Thompson signed a new change of counsel. From that point in time and onward, Mr. Richard Zelma was the attorney of record. [see exhibit "D"] That affiant had nothing to do with that case after May 21st.

7. Affiant believes that Mr. Zelma is a fine litigant who worked very diligently in support of Ms. Thompson. That this was a very difficult case as the court found that based upon the credible evidence. That the legal point was that the unsold share status was retained by Ms. Thompson regardless of the transfer by the sponsor as she stepped into the shoes of the sponsor. This is what set forth in the proprietary lease.

8. The offer that was negotiated by affiant with Rosen and Livingston would have reduced the costs of the violation significantly, without any risk of losing possession. Ms. Thompson's position on the subject was to proceed. She rejected this offer of settlement even though it was made clear to her that there was a good likelihood that she was going to lose possession of the apartment by not settling.

9. That from the first time that affiant saw Ms. Thompson to the last day that affiant was counsel, it appeared that Ms. Thompson genuinely appreciated Mr. Zelma hard work.

10. Affiant knows Mr. Zelma since law school, and

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he is a trustworthy, hard working attorney.

11. Affiant was planning on testifying on Wednesday, June 27th at 2:00 p.m., but because of my schedule affiant was not available at that time.

WHEREFORE, this affidavit is submitted on behalf of Mr. Zelma.

Dated: June 27th 2001 Stan Chovnick

Jurat:

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Supreme Count of the State of New York
Appellate Division: First Department

Laurie Thompson
v
490 West End Apartments Corp.
v
Dr. Felix

Index No. 130665/94

Stanley Chovnick Esq. duly affirms under the penalty of perjury and pursuant to CPLR 2106 as follows:

1. Affiant was the attorney of record with Richard Zelma from December 11th 1996 through May 20th 1997. [see exhibit "A"].

2. At first, I incorporate herein by this reference the correspondence that sent to Ms. Thompson on or about June 4th 1998, regarding the attorney client relationship and the retainer agreement that was agreed to. [see exhibit " B"].

3. During the time that Mr. Zelma and I were the attorneys of record, we had numerous settlement conferences in front of Judge Lehner. As we took over the case from an extremely negative position, the settlement offers that were discussed and which we tentatively agreed to, looked like an excellent opportunity to resolve this matter.

4. After lengthy discussions with our adversaries and Judge Lehner, we came up with several settlement offers that I thought were fair, and would allow her to settle the case giving her many rights to the apartment. After one of these meetings in court, I immediately called Ms. Thompson and set up a meeting to discuss the settlement offers. This took place in my office in April of 1997. Ms. Thompson and her

son were present. One such offer included a method by which almost all of the attorneys fees that were awarded to the adverse party would be paid for by the subtenant's use and occupancy. (Dr. Felix]. But of further import, was that possession would be retained by Ms. Thompson, and that there would be no further attorneys fees that she would have to pay for. I distinctly remember that both the undersigned and Mr. Zelma were in favor of the settlements and we urged her to accept it.

5. Ms. Thompson was adamant and rejected the offers. It was her position that different judges needed to review the case. I expressed to her my concern over the fact that if she were to continue the lawsuit, there was a strong possibility that she would lose possession of the apartment. Even after the meetings in my office with Ms. Thompson, I urged her in numerous telephone conversations to take the settlement. This was to no avail.

6. I distinctly remember all of the aforesaid events together with the ones mentioned in my correspondence to Ms. Thompson of June 4th 1998.

Stanley Chovnick

Dated December 15th 1999:

Jurat:

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Supreme Court of the State of New York
Appellate Division: First Department

In the Matter of
the Richard Zelma

Affidavit in Support
of Respondent

Stanley Chovnick an attorney duly licensed to practice law in the State of New York duly affirms under the penalty of perjury and pursuant to CPLR 2106 as follows:

1. That affiant incorporates herein by this reference my affidavit dated June 27th 2001, together with the correspondence of June 4th 1998 sent to Laurie Thompson by the undersigned, and my affidavit signed on December 15th 1999, as though fully set forth. see exhibits "A" and "B" & "C"].

2. Affiant would make this point very clear. Affiant specifically recalls that the first time that affiant met Laurie Thompson at my office on December 11th 1996, she, together with respondent, were alone at this meeting. My business records make this even more clear as the only time that my records set forth that Ms. Thompson's son was at my office. was in April of 1997. This was immediately after a settlement conference before Judge Lehner. All of the remaining aspects of the initial meeting was set forth in my letter to Laurie Thompson dated June 4th 1998 and affiant reiterates this under the penalty of perjury .

3. During the week of June 27th 2001, affiant did inform respondent that he will testify. Affiant was willing and able to testify but was unavailable to testify on June 27th 2001

4. Affiant further recalls having a conversation with

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another attorney sometime in the Spring of 1998 regarding this case. Affiant does not recall this attorneys name but that person did state that he represented respondent. We discussed this matter for a short period of time and affiant informed this man that I would be willing to testify on behalf of respondent.

5. Affiant was merely tied up on June 27th, and had thought that the testimony could be set forth the following day. Affiant understands that there will be a hearing before a panel of 3 or 4 members in the near future. Affiant would be very willing to coordinate any schedule with the committee, and appear before this committee for any questions. The best time period from October 25th-November 5th 2001 are November 1st, of November 2nd, upon being given reasonable notice.

WHEREFORE, affiant maintains that the affidavit signed by affiant on June 27th 2001, together with my prior affidavit of December 15th 1999 and my correspondence to Ms. Thompson dated June 4th 1998, are accurate and true, and affiant is willing and able to appear before this panel, and or, testify at another hearing before a referee in support of respondent.

October 3rd 2001:

Stanley Chovnick
317 Madison Ave.
Suite 2310
New York NY 10017
(212) 949-9696

Jurat:

APPENDIX G

Supreme Court of the State of New York
Appellate Division: First Department

In the Matter of the
Richard Zelma)

Affidavit in
Support of
Respondent

Stanley Chovnick an attorney duly licensed to practice law in the State of New York duly affirms under the penalty of perjury and pursuant to CPLR 2106 as follows:

The following testimony of Ms. Laurie Thompson has been brought to my attention:

> Bratton: Could you explain the circumstances under which you ended up paying these gentlemen these figures then without billing statements?
> Thompson: I asked repeatedly for billing statements. And why did I pay without a billing statement?
> Bratton: Yes, ma'am.
> Thompson: I wanted to keep moving the matter. [TRH 85, 2-11].

2. With all due respect to Ms. Thompson, it is affiant recollection that at no time ever did Ms. Thompson verbally ask for an accounting of any sort from the undersigned. Ms. Thompson and affiant had several conversations throughout the period of time that I was the attorney of record in the underlying matter from December 11th 1996-May 21st 1997. And to the best of my recollection, Ms. Thompson was always aware of the billable time put into this action and was

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in agreement with all amounts billed to her and paid by her.

3. Affiant can assure that the court and or the committee that had Ms. Thompson requested any additional billing information, one would have been presented to her immediately.

4. If the Committee wants me to appear in this matter, Affiant respectfully requests one week notice.

WHEREFORE, affiant maintains that all of my former affidavits together with my prior my correspondence to Ms. Thompson dated June 4th 1998, are accurate and true, and affiant is willing and able to appear before this hearing panel, and or, testify at another hearing before a referee in support of respondent.

November 15th 2001

Stanley Chovnick
317 Madison Ave.
Suite 2310
New York NY 10017
(212) 949-9696

Jurat:

APPENDIX G

Supreme Court of the State of New York
Appellate Division: First Department

In the Matter of
Richard Zelma

Affidavit in Support
of Respondent
Index No.

STATE OF NEW YORK
COUNTY OF NEW YORK)

Alan Grossman being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York.

2. I have known RICHARD ZELMA for nearly 20 years, both as a legal associate employed in my law firm during the 1980's and as a friend.

3. I am submitting this affidavit on Richard Zelma's character in order to assist this Court in its understanding of Mr. Zelma and to support his effort to remain a practicing attorney in New York State.

4. Richard Zelma was an outstanding law associate at the law firm of Zelma & Grossman, a law partnership between myself and Richard Zelma's older brother George Zelma.

5. Richard Zelma, as a law associate during the early 1980's, was hard working, ethical, trustworthy and professional. He was a model lawyer. He loved being a lawyer and brought his excitement about the law and intellectual power into every type of legal matter he was assigned. He would have made partner as quickly as any associate in any firm in New York firm.

6. On New Year's day 1984 he was a victim of a hit

and run accident. His legal career came to a sudden halt as he struggled for life and then to regain his health.

7. Richard Zelma never returned to the firm of Zelma & Grossman as a full-time attorney and the firm dissolved in 1987.

8. Richard Zelma never returned to the full-time practice of law. After his accident Mr. Zelma could not read or retain any information when he was first released from the hospital in 1984. Mr. Zelma's recovery has been a long and tedious process. Mr. Zelma's patience and hard work have been rewarded. A review of his appellate litigation shows that his recovery has been complete.

Mr. Zelma's practice's law as a sole practitioner. His solo practice has isolated him from a legal and law office environment that would offer him more support and feedback. It is my understanding and belief that many of the issues confronting this court could have been avoided if Mr. Zelma was working in a law office.

9. I have remained a friend of Richard Zelma since his accident. We talk on a regular basis, mainly about news, music, movies and occasionally general legal affairs. Richard is always a joy to talk with. He is informed. He has opinions and he loves nothing more than a rousing discussion and argument that requires the marshalling of evidence and opinion.

10. I know Richard Zelma to be honest, trustworthy and credible. I would trust him to handle sensitive legal and financial matters on my behalf.

11. I believe that closer scrutiny of the facts and matters asserted against Richard Zelma will reveal that Richard Zelma zealously represented his client and that there was no intentional wrongdoing on his part.

12. This character affidavit is offered in support of Respondent Richard Zelma. Please note that affiant would

have testified on June 25, 2001, however I had two real estate closings. I was also prepared to testify on Thursday June 26th but was informed that an affidavit would suffice.

July 2, 2001

Alan Grossman

Jurat: July 2, 2001

PROCEEDINGS

TRH p. 421

REFEREE: But you will obtain the record of the sanctions of the United States District Court?

BRATTON: Yes. Yes. I will forward that to you along with my proposed findings of fact and conclusions of law.

REFEREE: And mark it?

BRATTON: yes.

REFEREE: Okay. And the affirmance?

BRATTON: Yes.

REFEREE: By the Second Circuit. Okay, do you have any evidence you wish to submit in mitigation?

STEVENS: I have a witness, potential, not potential, Mr. Allen Grossman will testify tomorrow at 1 o'clock.

REFEREE: I'm sorry, before tomorrow 1 o'clock. this case will be over Mr. Stevens, you have a history of having gone to the court, having come to me for months now, asking for adjournments because something might happen and something could happen and some witness might I find that you didn't -- would you take

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the stand again please?

REFEREE: Just to finish that sentence. I find that much of what you represented to me and to the court with respect to the need for adjournments has

TRH - P.429

hoping for, and I was hoping that I would get back all, or I'd get a decree from them saying that this, I know this is a farfetched proposition, but I still that was very unfair. So I wanted my money back in that sense. So this is what I as awaiting. And then I was speaking at that time with Cooper, and at that time I was under the impression that Mr. Cooper was seeking X amount of dollars. agreement, When I received and I read his retainer I then called him up and I wrote him a letter stating something to this effect, that I want to make sure that there's a ceiling to this fee.

REFEREE: Okay.

WITNESS: That's what was happening.

REFEREE: Thank you.

WITNESS: Okay.

REFEREE: When we adjourned on Monday, I asked you how many witnesses you had on the subject of mitigation. You gave me several names. I don't have the record in front of me, so I don't recall. As of now do you have any witnesses, except for somebody who may be available two days from?

STEVENS: Allen Grossman will be available tomorrow at 1. He's completely booked today.

REFEREE: And Allen Grossman is who?

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STEVENS - DIRECT

the background of my relationship.

REFEREE: Just tell me, and I don't need the background in your relationship. Tell me what she testified to that was false. I'll take it for what it's worth.

WITNESS: That I was her lawyer before Stan Chovnick.

REFEREE: Okay.

WITNESS: And that she never knew or understood the role of Stan Chovnick.

REFEREE: Okay

WITNESS: Okay. That no $300 agreement was entered into with me and Stan Chovnick.

REFEREE: Okay.

WITNESS: Okay. Also, Mr. Arkin testified that he was at the first meeting with Stan Chovnick, that is false. Okay. That she was not willing to lose possession of the apartment for purposes of the appeal, she testified to that. That is not true, she was willing to sacrifice that. That she never told ...

REFEREE: Excuse me. Your brother testified to the contrary.

WITNESS: No, he did not.

REFEREE: Your brother testified that she was

APPENDIX G

Stanley Chovnick
Attorney at Law
317 Madison Ave.
Suite 2310
New York, New York 10017
(212) 949-9696
Fax: (212) 949.6241

Laurie Thompson
490 West End Avenue
New York, New York 10024 June 4th, 1998

Re: Response to your inquiry

I have spoken with Mr. Zelma concerning your letters and for your information, I would just like to confirm the following facts.

On December 11th 1996 you changed counsel from Mr. Stern Esq. to me and Mr. Zelma. This was done at my office at 317 Madison Avenue. At that meeting, we went over the financial terms of the attorney-client relationship. The fees to be billed were at an hourly rate of $300.00. You wee billed at that fee on a continuous basis for this length of time. However, Mr. Zelma and I discussed the fee arrangement, and by virtue of the fact that further fees were to be billed for the perfection of the appeal coupled with the filing of the main brief; reply brief; and oral argument; we decided to bill you for less than the total time that we each spent during that period. Mr Zelma's hours alone, not including my time came to 292 hours. And, I put in almost as many hours considering that I reviewed the entire file and record, and was intimately involved in all of the proceedings.

It was at all times made clear to you from the first time we met on December 11th 1996 that I was not to be in

APPENDIX G

charge of the briefs to the appellate court. Both Mr. Zelma and I made clear that he was the attorney to handle the appeal, whereas I would attempt to settle the case. During the time period from December 96-May of 97, we did indeed proceed to such negotiations on the phone, as well as in chambers on numerous occasions. Furthermore, we obtained a T.R.O on the sale of the apartment 1(c) and made numerous motions and appearances in order to vacate the underlying decision of the trial judge. There were two definite offers to settle the case which you respectfully declined. Your choice was to proceed with the appeal and allow other judges to review the matter. You made your intent very clear in writing on or about May 4th 1997. [enclosed].

Very shortly thereafter, a second change of counsel was signed by you; Mr. Zelma and myself. It was Mr. Zelma who was the sole attorney as of May 21st 1997.

I understand that the appeal is pending before the Appellate Division. It is my hope that the case will be decided expeditiously in your favor.

Very truly yours,

Stanley Chovnick

enclosure

APPENDIX H

BEFORE THE DEPARTMENTAL DISCIPLINARY COMMITTEE OF THE APPELLATE DIVISION OF THE SUPREME COURT STATE OF NEW YORK, First JUDICIAL DEPARTMENT

In the Matter of — RP No. 32/2000

Richard S. Zelma, Esq. — AFFIDAVIT

STATE OF NEW YORK) :ss:
COUNTY OF NEW YORK)

PETER MARC STERN, being duly sworn, deposes and says:

1. I have been requested by Richard Zelma, Esq. to state certain facts within my personal knowledge that is hereinafter set forth.

2. That deponent served as attorney for Laurie Thompson in a complicated and hotly disputed apartment action for the period approximately March 1995 through December 1996.

3. Deponent has reviewed his previous affidavit dated April 7, 1997, and reaffirms all of the statements and allegations set forth therein, and believes that they are and remain true in all respects. A copy of same is annexed marked Exhibit "A".

4. During post-trial/pre-decision conferences with Judge Lehner, the Judge, in the presence of adversary counsel, on several occasions (there were two or possibly even three conferences) cautioned that if the case was determined against Ms. Thompson, that her damages could be more severe than money - that her right of possession to

the apartments was at stake. Deponent immediately communicated this to Ms. Thompson (who was in the waiting area of the Judge's Chambers). Deponent had therefore repeatedly advised Ms. Thompson of this danger, very likely in writings. Deponent further advised Ms. Thompson that Judge Lehner's caution might be a signal - a signal that he would find against her, and that therefore, she should very seriously consider settling the matter before a possible adverse decision. After extensive discussion, Ms. Thompson, with full knowledge of the proposed settlement and the potential consequences of rejection, advised deponent not to settle unless she could freely sublet the apartment to whoever she preferred. No settlement resulted, and the Judge's decision was adverse.

5. Deponent has also reviewed a communication from Ms. Laurie Thompson dated September 8, 1998 together with deponent's response dated September 8, 1998, communicated by fax, copies annexed marked Exhibit "B" which were telefaxed to Ms. Thompson's counsel at said time, Richard Zelma, Esq., and deponent never heard further with respect to the matter until now. Deponent recalls that deponent was most upset and disturbed by the communication from Ms. Thompson which suggested that deponent was in collusion with Mr. Steindam, and that deponent had somehow compromised the interests of Ms. Thompson. Nothing could be further from the truth. Deponent did not know Mr. Steindam before he appeared in connection with the Thompson action, and never communicated with Mr. Steindam again except approximately two years later when deponent bumped into him at Surrogate's Count, Queens County, and also thereafter when Mr. Steindam was adversary counsel on a new litigation matter.

6. The reason that there was no stipulation as set forth in Ms. Thompson's telefax dated September 8, 1998 was that

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Ms. Thompson, against deponent's advice, told deponent not to ask for one. Deponent recalls that Ms. Thompson was on close terms with Mr. Steindam's clients who were her tenants next door, and Ms. Thompson advised deponent on several occasions when deponent brought the matter up, that she did not wish to bring about any friction or create any hostility. Deponent repeatedly recommended that Ms. Thompson demand such a stipulation and establish a rent escrow or institute litigation against Mr. Steindam's clients to obtain payment of rent. Ms. Thompson adamantly refused to do so. Deponent recalls that this matter may have been brought up in a written communication or communications to and/or from deponent to Ms. Thompson, although it is also possible that the communications between us were entirely verbal. Deponent states that all of deponent's records on this case are in storage in Kingston, New York.

Peter Marc Stern

Jurat: October 5, 2001

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TRH - p. 313

STEVENS DIRECT

WITNESS: I agree.

REFEREE: And why is that relevant to anything?

BRATTON: That was my next --

WITNESS: I think that is relevant because it is --

REFEREE: What did she say that would, that would, if untrue, would reflect on your right to withdraw the escrow funds?

WITNESS: She acknowledged and consented to me --

REFEREE: What, she acknowledged what?

WITNESS: What did she say? She's just not, she is just a very bitter person who has lost, who has had numerous lawyers before me and who --

BRATTON: Objection.

REFEREE: Let him go on.

WITNESS: Whose had numerous lawyers before me where she was willing to sacrifice possession. She turned down offers to settle on a dozen occasions from numerous lawyers as well as me. And she wanted to appeal this case at any cost.

REFEREE: Okay. All right. Now, what else do you want to testify to?

WITNESS: That her, well, I wanted to go over

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Richard Stevens
221 West 82nd Street New York NY 10024
(212) 724-7721 Fax: (212) 362-4383
Admitted: NY & Cal.

August 2nd 2001

Justin N. Feldman, Esq.
Kronish, Lieb, Weiner, and Hellman
10 Lovey's Cove Road
Chilmark, Mass. 02535
By Federal Express

Dear Mr. Feldman:

Re: Response to Mr. Bratton's correspondence
of July 31st 2001, received on August 1st.

I am not going to regurgitate over the Levine case as this was gone over in detail in my statement of facts dated July 18th 2001 as well as my in court testimony on June 27th 2001. All one needs to do is ask Justices Williams and Andrias of the Appellate Division First Department. [see pages 60-62 of statement of facts dated July 18th 2001 citing *Mark G v Sabol*]. In a 3-2 decision, rendered in 1998, the First Department found that there was no private section 1983 cause of action for the children. This was predicated in large part to the status of the Suter and Wilder cases. The sharp difference in analyzing Suter, Wilder, and the numerous cases regarding federal statutory causes of actions under § 1983, is self evident. [*Mark G v Sabol*, majority opinion 247 A.D. 2d 15; at 18-27; dissenting opinion at pages 33-40; (1998) copy enclosed].

In 1999, the Court of Appeals reversed. Judge Smith

of the NY Court of Appeal in one or two paragraphs, stated that Blessing allowed a statutory cause of action. [see *Mark G. v Sabol,* 93 N.Y 2nd 710; 695 NYS 2d 730 at 738-39, (1999), concurring opinion].

The point is that there was a federal statutory right created by Congress under 42 USC § 5106(a)(b)(2) under the Child Abuse Prevention and Treatment Act. It was alleged that these statutes did create the right to "investigate" the alleged rape of the child by the stepfather, and that this only took place after the county issued a restraining order that Mr. Levine obeyed. Judge Sprizzo dismissed the case but never stated one word on the core of subject matter jurisdiction, which was the statute passed by Congress. [see *Levine* v *County of Westchester,* 828 F. Supp. 238 (1993)]. Indeed, another federal district court judge found that this exact statute did create a federal right. [see *Jeannie B* v *Thompson,* 877 F. Supp. 1268, at 1285-1286 (E.D. Wis.) (1995), finding section 42 U.S.C. 5106 (a) (b) (2) to create federal right].

Without belaboring the point that I made in my testimony, the courts were having a hard time in dealing with Suter when respondent signed the complaint in 1992. The concurring opinions in Blessing recognized that Wilder and Wright were revived. As set forth by Justices Scalia and Kennedy: "It must be acknowledged that Wright and Wilder *permitted beneficiaries of federal state contracts to sue under* ¶ 1983." [emphasis added **Blessing v Freestone**, 117 S. Ct. 1353, at 1364 (1997)]. Nevertheless, the continuous contention that Suter reigns even after the United States Supreme Court issued Blessing, wrangled the courts thereafter. The proof of the pudding is the First Department's decision in Mark G v Sabol in 1998.

In Levine, it was the federal statute that was the first factor to discuss for purposes of whether there was a viable

cause of action raised on behalf of the child and her father. If the answer to that question was in the affirmative, the constitutional question which the court felt it was compelled to chat about, would be moot.

Three leading Supreme Court cases have made clear that the proper standard of review is to discuss the federal statute raised before any constitutional point.

As set forth in *In re Snyder:*

" We should avoid constitutional issues when resolution of such issues is not necessary for disposition of the case. [472 U.S. 634, at 642(1984)].

As set forth in *Youakim:*

" Vacating the judgment and remanding the case for this purpose will require the District Court first to decide the statutory issue... A remand is thus consistent with our usual practice of *avoiding decisions on constitutional matters if a* case can be resolved on other grounds." [**Youakim v Miller**, 425 U.S. 231,236 (1976)]. As set forth in *Jean* v *Nelson:*

This is fully consistent with the maxim that " *prior* to reaching any Constitutional questions, *federal courts must consider nonconstitutional* grounds for decision." [Jean v Nelson, 472 U.S. 846, at 854 (1985) quoting Gulf Oil Co., v Bernard, 452 U.S. 89, 99 (1981)].

The bottom line is that without Congress passing the federal statute under the Spending Power of the Constitution, [Article I § 8 cl. 1]. no cause of action under § 1983 would have ever been filed in federal court by respondent. This was the underlying basis for subject matter jurisdiction as set

forth in the brief to the circuit Court in 1993 -94.

As set forth in Point V of the main brief to the Court of Appeal in November of 1993:

> " There is Subject Matter Jurisdiction of All Parties By Virtue of the Child Abuse Prevention Treatment Act and Ankenbrandt v Richards. [attached; please find pages 47-65 of main brief to Circuit Court dated November 2nd 1993 relying on Wilder and comparing Suter at page 60 citing footnotes 8 and 12 in Suter which was quoted thereafter on March 22nd 1994] Also see pages 13-15 of brief to Circuit Court dated March 22nd 1994 quoting Suter v Artist M, 112 S. Ct. 1360 at 1367 footnote 8 and at 1369 ft. note 12 .

Mr. Bratton's letter of July 31st 2001 sends a decision rendered by Judge Sprizzo on January 31st 1996. This is over one year *before* the United States Supreme Court rendered Blessing v Freestone. [*Blessing* v *Freestone,* 520 U.S. 329 (1997)]. In essence, this decision is respectfully moot.

As the law changed without any reversal, and as there was continued disagreement between the respected judges of the First Department thereafter, surely one can see that this private admonition is indeed quite hazy at best. Although the statute of limitations would bar the re-opening of the mistaken identification on behalf of the child and her father in the Levine matter, this should not permit the continued punishment of respondent when he was in all likelihood correct to commence the case from the very outset.

What is very clear is that the Committee cannot in an ex-post facto manner punish affirmant for properly relying on

Wilder and Suter in 1992. To punish a person for conduct that was clearly legal at that time is a form of an *ex-post facto law* that cannot prevail in our society. [see i.e. *John Doe* v *Otte*, 2001 WL 826671; __ F. 3rd __ (CA9) (decided April 9th 2001); Article I § 10 *of the United States Constitution:* also see *California Dept of Corr* v *Morales*, 514 U.S. 499, 506 n.3 (1995) & *Calder* v *Bull*, 3 U.S. (3 Dall.) 386, 391 (1798)]. [10]

Conclusion

The relevant issue is the credibility and lack thereof throughout the proceedings of Ms. Thompson and one of her sons Steve Arkin, not the questionable admonition in the Levine case. There are between 10-15 material misrepresentations raising the question of perjury on the part of the complainants. This is" subject to further review" of the entire record; statement of facts; and briefs submitted by both parties, as this court set forth on June 21 st; 25th and 27th. [see pages 2-7 of respondents statement of facts dated July 18th 2001; TRH 396].

To reiterate: there was no law that was reversed by

---

[10] Of import to note is that the issue of "rape" was never before the state court to consider in the Levine matter. The bill of particulars set forth the hearing to be for the time that the biological father had access to the child. The alleged rape of the child only took place afterwards. The sole parties who could have ordered the investigation of the rape were the county officials and or the justice of the family court. Therefore, the issue of the prospective investigation as mandated by Congress, and the appointment of a new law guardian on a prospective basis, were not "inextricably intertwined" with the state court proceeding. [see i.e. **Mullins v State of Oregon**, 57 F. 3rd 789 (CA9) (1995)].

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the Supreme Court in Blessing when it was rendered in 1997. Rather, the United States Supreme Court made certain that its fonDer rulings will not be inappropriately analyzed any further. As such, the law that was relied upon by respondent was proper in 1992 through 1997. To punish a person for conduct that was legal at the time is not constitutionally proper.

Lastly, I informed Mr. Bratton on or about July 27th that the original exhibits to my testimony of June 25th is available and that you were served with them on July 18th. [see my reply dated July 28th to staff counsel's opposition papers dated July 25th to motion dated July 23rd returnable July 31st and please see exhibits "S1-S40" attached to testimony of June 25th 2001]. Mr. Bratton has most of the exhibits already and as promised, he will be given any of the letters that he may not have immediately. He has all of the other exhibits as they are in the original record that staff counsel was served with when respondent filed the answer of December 20th 1999.

Thank you for your time and attention.

cc: Mr. Bratton:

Very truly yours,
Richard Stevens

APPENDIX I

PERSONAL AND CONFIDENTIAL
Andral N. Bratton, Esq.
Departmental Disciplinary Committee 61 Broadway
New York, N.Y. 10006

August 4, 2001

Richard Stevens, Esq.
221 West 82d Street
New York, N. Y. 10024

Matter of Richard S. Zelma (Stevens). Esq

Gentlemen :

I am in receipt of Mr. Bratton's letter of July 31, 200 I and Mr. Stevens' response dated August 2,2001. Judge Sprizzo's decision of January 31,1996 is received in evidence as "Referee's Exhibit 11", and Mr. Stevens letter (without enclosures) will be received and marked "Referee's Exhibit 12"- not for it's averments, it's substance or truth but for purposes of reference.

Per Mr. Bratton's request I am forwarding to him the documents marked "S 1-37, and 39-41" sent me by Mr. Stevens with his post-hearing submission. I have retained S 38, a letter from Mr. Zelma to Mr. Bratton dated January 31, 2001, which will be received in evidence and marked as Referee's Exhibit 13 All of the others are rejected as irrelevant, repetitious, incompetent and self-serving. They may be marked for identification but they are not part of the record before me. Neither are the documents offered at the hearing which were marked for identification but not received in evidence.

Very truly yours,
Justin N. Feldman Referee

APPENDIX I

Richard Stevens
221 West 82nd Street
New York NY 10024
(212) 724-7721 Fax: (212) 362-4383
Admitted: NY & Cal.

August 11th 2001

Justin N. Feldman, Esq.
Kronish, Lieb, Weiner, and Hellman
10 Lovey's Cove Road
Chilmark, Mass. 02535
By Federal Express

Dear Mr. Feldman: Re: Exhibits "S1- S41 "

During the course of the hearing of June 25th 2001, I was testifying and reading from a document, when you suggested that the prepared document be entered into evidence in lieu of my oral testimony. The documents and the exhibits were received as evidence with no objection. (record pages TRH 385-386 - marked as exhibit "S").

On June 26th 2001, I faxed the document containing my testimony to both you and Mr. Bratton. [letter of June 26th enclosed].

On July 3rd 2001, I submitted three corrections with regard to exhibit "S" in evidence. [letter of July 3rd 2001 attached]. The July 3rd letter confirmed the submission of the sworn testimony and exhibits. No one ever suggested that this was not the case. I relied upon these items having been entered into evidence at the hearing to fundamentally state my position in the record. I further relied upon the "testimony" and the "exhibits" being in the record as evidence afterwards, in my statement of facts; conclusions of law; and my brief

APPENDIX I

dated July 18th 2001, together with my motion to re-open returnable July 31st.

I met with Mr. Bratton on July 11th 2001. At this meeting, we telephoned the referee of our meeting, and for my requesting a two day extension to file the statement of facts and conclusions of law and brief. You granted the application to the extent that I was allowed to file and serve the statement of facts and brief on July 18th. It was during the meeting of July 11th at Mr. Bratton's office, that he and I reviewed most of the exhibits that were referenced in exhibits "S" in evidence in lieu of my oral testimony. At all times it was fully understood that my "testimony" coupled with the exhibits that it referred itself to would be an important basis for the upcoming statement of facts and conclusions of law.

Respondent has relied on the exhibits as evidence to establish that the complainant's testimony is inundated with false representations made under oath. It is further relevant to corroborate my testimony.

Any respondent has the fundamental right to submit evidence. This is especially the case when there was notice long before the submission of the statement of facts and brief that if there is any objection that this must be revealed immediately. [July 3rd letter]. As no such objection was made after July 3rd, and or at that time of the meeting of July 11th, any such objection now is not timely. Therefore, it is respectfully requested that the exhibits marked exhibit "S" and S1-S41, be entered as evidence, for all purposes including respondents statements of facts; conclusions of law; brief; and the motion to re-open.

Thank you for your time and attention.

cc: Mr. Bratton

Very truly yours,
Richard Stevens

APPENDIX J

III: Incredulous Testimony of Thompson and Arkin regarding respondent informing them of withdrawals from funds which respondent held.

Thompson's 11th + material misrepresentation made before this court. And, Arkin's 2nd false statement made under the penalty of perjury.

First of all, there is no misunderstanding on the dates at issue. Laurie Thompson fully understood that August 1997 was when funds were received by the attorney of record in the 490 West End Ave. matter. ["TRH" 101].

Laurie Thompson in unequivocal terms testified on 5 separate occasions that there was a meeting with respondent in August of 1997, wherein he revealed to her that he had withdrawn $ 40,000.00 in funds.

The testimony is set forth in relevant part as follows:

1. Bratton: I'm just trying to find my next document. I'd like to show you what has been marked as Staff exhibit "4" for identification, and let the record reflect this is already offered into evidence, and I have previously furnished both the Referee and Mr. Stevens with copies of this. I ask you to take a look at this document and ask you if you recognize it
Referee: What's the number on this?
Bratton: Staff 4.
Stevens: Which one is this one?
Bratton: Staff 4. It's your November 15th 1997 letter. [TRH pages 108 line 22 - page 109 line 29 emphasis added]
Stevens: Do you have a document in November of 97 asking for an accounting?
Bratton: No, no.

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Stevens: Thank you. [TRH 111 line 21-25].
Bratton: Now at the time you received this November 15th billing statement, if you remember, were you aware that he had already taken $ 42,000.00 out of your escrow account?
Witness: There was some point that he came in August of 97 and said that he had taken $ 40,000.00 out of the escrow account. [TRH 112 line 4-6].
Stevens: Okay, I'm not. But did you say August of 97, that's all that I want to know.
Bratton: I object to this.
Referee: She said what she said, it's all on the record.
Stevens: Okay. fair enough. [TRH 112 lines 20-25]
Bratton: And this was where, where did this conversation take place?
Witness: It was in my apartment.
Bratton: And who else was present?
Witness: My son Steve. [TRH 112 line 16-20

2. Referee: And how and when did you first become aware of the fact that he took $ 42,000.00 out?
Witness: The $ 40,000.00, he came to me and told me about the $ 40,000.00.
Referee: When was that, do you recall approximately?
Witness: That's on that piece of paper inside.
Referee: What is the material on the piece of paper --
Witness: No, I put down a sequence of dates, that's all
Referee: You put down what?
Witness: A sequence of dates, chronological dates.
Referee: Approximately?
Witness: August 97. [TRH 128 line 15- 129 line 5].

2. Mr. Arkin was called on behalf of Laurie Thompson. He testified in relevant part as follows:

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Bratton: Now I want to fast forward a bit to late 1997/1998, did you ever have any discussions with Mr. Stevens about his taking all of the $ 115,000.00 as his legal fee?

Witness: He came one evening to talk to my mother.

Referee: When?

Witness: It would be, I can't fix an exact date. He was in and out so often, [11] it was an evening before the motion was filed with the appellate court. [12] [TRH 203 line 19 TRH 204 line 3].

Referee: Excuse me, wasn't the appeal already filed? Wasn't the bond already---

Witness: The bond was in place but nothing had been filed with the appellate court. [TRH line 16-line 19].

Then, on cross-examination, Mr. Arkin made clear again, that the time of the so called meeting with respondent and his informing Ms. Thompson and himself of the $ 40,000.00 already being withdrawn was in August of 1997.

---

[11] As of April 14th 1998, respondent rarely went to Thompson's residence. [see staff counsel's exhibit "6". [TRH 119]. It was in the summer of 1997 that respondent was at the home of Thompson frequently. [id. also see respondents exhibit "S25" - discussed with staff counsel exhibit "6" infra page 53]. Any contrary suggestion is totally without merit and not supported by the record itself.

[12] The motion to expand the time to perfect the appeal was made in August of 1997. [see sworn to testimony of Respondent dated June 25th 2001, submitted as respondents exhibit "S" at page 15]. Therefore, the testimony of both Arkin and Thompson is clear that they met with respondent in August of 1997 and from at that point in time and onward they knew that respondent took $ 40,000.00 from the funds they had given to me.

APPENDIX J

Witness: There was a conversation where you proposed to her that she file with the appellate court.
Stevens: That I proposed to her to file with the appellate court.
Witness: Correct.
Stevens: Okay
Referee: The bond is already in place
Witness: Correct
Referee: Wouldn't that necessarily, Mr. Zelma, been within 30 days of the judgment?
Stevens: Are you asking me ?
Referee: Yes
Stevens: I have no real comment on this.
Referee: As I understand it, the appeal would have to be filed within 30 days of the entry of the judgment.
Stevens: Of the judgment by whom.
Referee: The judgement being appealed.
Stevens: Notice of Appeal, sure.
Referee: Yeah.
Stevens: Sure. Which year are you talking about?
Referee: The entry of the judgment was on or about August 6th
Stevens: That's correct. 97.
Referee: 97.
Stevens: I have no further questions. [TRH page 215].

The bank records of respondent reveal no improper withdrawal arguably at anytime and most certainly not in August of 1997. [see staff counsel exhibit "3"].

This is the 11th material misrepresentation made by Laurie Thompson. She attempts to link the subsequent withdrawal in October of 1997 which was predicated upon my bills for the appeal and her consent to me at her home on that date and thereafter on or about January 10th 1998. And,

this is the second inaccurate testimony of Arkin. [13]

This is inconsistent with the sworn to testimony of respondent. As set forth on respondent's testimony of June 25th page 21: [exhibit "S"]

"Contrary to Laurie Thompson's testimony, Ms. Thompson and I had numerous conversations concerning the point that she was to pay me the fees that were billed upon her. Not once ever, was there any insinuation that my time for the appeal was not genuine.

And, part of the reason that there was never any massive problem was that I specifically went over to Laurie Thompson on or about October 15th and immediately after the filing of the main brief to ask her if it was o.k. to withdraw money from the escrow account?

In unequivocal language, she said yes. She did not even ask me the first time of how much [when it was $20,000.00] and the second time which was immediately after the reply brief, in front of the door to her living room, she asked how much and I told her $ 40,000.00. She was walking and she stated: That is fine. Period. At no time did I ever state to Steve Arkin that this was a crime as he was not present. I informed Ms. Thompson of the $ 40,000.00 on or about January 10th 1998. If anyone overheard this it could

---

[13] As revealed in the testimony of respondent of June 25th 2001, it was Mr. Arkin who was the primary person who insisted on proceeding on the appeal. He had huge fights with his brother on the subject. Respondent was directed never to discuss the case with anyone by Laurie Thompson as a result of this internal dispute. [see exhibit "S" pages 16-17]. Mr. Arkin may indeed be very biased and or hostile as this was his decision. [see Richardson. Evidence. § 6-415 & 6-416, citations omitted].

have been Julien her secretary. [14]

When one examines the bank records of respondent, coupled with the time that was billed for the appeal, one can see that the amount of money withdrawn was less than the time that was spent on the case and which was "due". The time from August 8th 1997-October 15th 1997 was approximately 163 hours. When one multiplies this by $300.00, the amount would $ 48,900.00. At that time, the escrow account was far in excess of $ 14,000.00 less $48,900. [see staff counsel exhibit "8"]. On or about January 10th 1998, the total amount of hours billed was over 300 hours further hours. The same principles apply to the amount withdrawn with the explicit permission of Ms. Thompson.

Not only are Thompson's own letters of April 14th; 27th and May 11th 1998 not consistent with her "verbal" directives as of November 15th 1997 of an accounting from respondent for the perfection of the appeal; not only are her part-payments after November 15th 1997 consistent with the premise of respondent that an account stated with a balance due was admitted by Thompson; but Thompson and her son Arkin testify in open court to respondent informing them in August of 1997 of a $ 40,000.00 withdrawal in an attempt to link that withdrawal to the one made in October of 1997 for which Thompson had at all times consented to. [see TRH 351 line 11 & 12].

This type of "subsequent repentance" and or "knavery" by a client has been rejected by the courts for the past 120 years. [see i.e. **Heyward v Maynard**, 119 A.D.

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[14] There was never any meeting with Thompson and Arkin in August or at anytime in 1997 concerning the funds retained. The objection to respondent not specifying this as credit in the separate bills of November 15th 1997 is maintained. see TRH 119 line 2-3].

66, at 69 (1st Dep't) (1907); **Fischer- Hansen v Bklyn Heights R.R. Co.**, 173 N.Y. 492, at 499 (1903), citing **Goodrich v McDonald**, 112 N.Y. 157,163 (1889); and **Matter of Heinsheimer**, citing Fischer at 214 N. Y.361, at 365 (1915) (Cardozo J.)]. Please see brief attached hereto with other citations and authority.

APPENDIX K

EMANUEL K. GORDON, MD, FACEP
1916 COMSTOCK AVE.
LOS ANGELES, CA 90025
310-553-9671

October 9,2002

To whom it may concern:

I am writing regarding my patient Richard Zelma. I have known Mr. Zelma for approximately twenty years, both proceeding and subsequent to his traumatic cerebral injury in 1985. I would like to state several general facts about cerebral function and specifically relate them to Mr. Zelma's case.

There are distinct areas of the cerebral cortex that function to facilitate voluntary motor function. These areas, known as the 'motor cortex', reside in the parietal and posterior frontal lobes and are relatively similar in location in all patients. Voluntary physical activity is dependent on intact function of this motor cortex. Specific injuries to a portion of this area lead to specific deficits in motor function, for instance contralateral paralysis of an extremity.

The functions of complex cognitive and analytic thought and emotional liability reside in other areas of the cerebral cortex, distinct from the motor cortex. These areas are located primarily in the temporal and frontal lobes. A disorder of the motor cortex leading to paralysis of the left arm, for instance, will have no impact on a patient's cognitive ability.

Mr. Zelma sustained a contusion to his left temporal lobe in 1985. During the next decade, he had infrequent post-traumatic seizures which have been successfully controlled by relatively small doses of medication.

APPENDIX K

I have observed Mr. Zelma's ability to engage in complex cognitive thought over the past twenty years, and can state unequivocally that his current function is identical to that he exhibited prior to his traumatic event in 1985 and subsequent history of post-traumatic seizures. In summary. Mr. Zelma's cognitive function is unimpaired.

I have suggested Mr. Zelma have a PET evaluation of his cerebral function in order to determine the degree of residual damage - if any - remaining from the temporal lobe trauma he sustained in 1985.

Emanuel K. Gordon, MD

APPENDIX K

ROLLAND S. PARKER, Ph.D.
CONSULTING NEUROPSYCHOLOGIST

OFFICE PRACTICE
19 West 34th ST. - Penthouse
New York, NY 10001
212-947-7111, x 328

June 26, 2001

Justin Feldman, Esq.
Gronish, Lieb, Weiner and Hellman
1114 Avenue of the Americas (45th Floor)
New York, NY 10036

Dear Mr. Feldman:

Mr. Richard Stevens has called to my attention that you are responsible for resolving a serious disciplinary charge against him.

As you are aware, Mr. Stevens had a serious neurological injury some years prior to the event that concerns you. He has requested that you change the schedule of his appearance so that he can consult with me from 12:30 to 2:30 PM on Thursday, 6/28/01, in order for me to obtain information and offer a professional opinion that may be useful for you to consider in this matter. If the above schedule is not suitable, my next available opportunity to meet with Mr. Stevens would be Tuesday July 3, 2001.

Respectfully

Rolland S. Parker, Ph.D

APPENDIX K

Date: Thursday, April 19, 2001 10:32:15 AM
From: RSteve714
Subj: 2 telephone calls of today and other possible witnesses etc.
4/18/01
To: rsupple@blhny .com

1. I thought that Jack Goldberg was so important, that I decided to call you and leave a message on your voice mail. I have the highest form of respect for him. He helped me and he knows criminal law inside out !!! He knows lie detector tests as well. This guy is a real pro. 212-227-1900

2. I called and left a message with Jack Rattock. This is the psycho- neurologist. He too knows what he is talking about. If I have my way, I will set up a meeting and discuss my situation with him at length. After that, he will talk to you. I believe that he can effectively terminate any concern for "intent" which I never had in any event.

APPENDIX L

ZELMA - DIRECT, TRH - p.260

and the respondent are brothers.

WITNESS: Yes we are.

REFEREE: You are named Zelma, and he is named Stevens.

WITNESS: So I understand, yes.

REFEREE: What do you mean you understand?

WITNESS: I know, I know that my name is

REFEREE: Do you have the same parents?

WITNESS: Yes.

REFEREE: So he changed his name?

WITNESS: Apparently.

REFEREE: Right. Okay, now this conversation which took place when you were in Miami, and do you know where he was at the time?

WITNESS: Richard, Richard was in New York.

REFEREE: Okay.

WITNESS: And Mrs. Thompson was also in New York?

REFEREE: All right. And who, was she on the line at the time?

WITNESS: She was on the line. I had one-on- one conversations with her, but the initial one was a conference call. And then there was, they were a marathon.

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REFEREE: I'm now talking about only one call a call in July which you first were, excuse me, I want to characterize it, was that the first time you heard the name Lauri Thompson?

WITNESS: That is.

REFEREE: Okay. I'm now talking about the phone, that phone call in July when you were in Miami, your brother Richard was in New York, and you first heard the name Lauri Thomason.

APPENDIX L

WITNESS: Yes
REFEREE: What was that conversation? did you say to him? What did he say to you? What did Miss Thompson say to you? What did you say to Miss Thompson? Give me all of that please
WITNESS: Well, I believe that the subject of the litigation was described to me, negotiations
REFEREE: By whom?
WITNESS: By --
REFEREE: Please where you can identify the speakers.
WITNESS: Yes, I believe it was by Lauri Thompson, and I think that my brother to some extent, Richard helped in, in defining those issues, which I don't recall, frankly, with any clarity

TRH - p.262

right now but I do recall that there were several subsequent conversations, and the case was resolved to everyone's satisfaction
REFEREE: Before you ever met her?
WITNESS: Before I ever met her
REFEREE: Okay It was resolved as a result of phone conversations that you had with somebody?
WITNESS: Yes, and research which I did there. And it enabled me to point out to the, the other side of that case that they had a weakness in their position. And they understood that. And as a result of that, a settlement could be achieved
REFEREE: Okay.
STEVENS: Do you recall that in that case there was a federal district court judge that issued an order and that the sheriff put a
REFEREE: Ask him what the case is about and what he recalls about the case please.
WITNESS: I, well.

APPENDIX L

STEVENS: I'm sorry. Well, what was the real turmoil to Lauri Thompson?
REFEREE: I don't know that the word turmoil
BRATTON: Objection, relevance
REFEREE: Strike that.
STEVENS: Okay. What was the case about do you recall?

TRH - p.263

REFEREE: What was the conversation about, first? The conversation was about the case what was he told the case was about in that first conversation?
WITNESS: There had been a, some kind of a lien placed on bank accounts that were controlled by Miss Thompson as a result of the -- and also, fees were discussed. I don't know if it was the very first conversation, but I told Miss Thompson that
REFEREE: I'm asking about only one conversation right now please.
WITNESS: Right.
REFEREE: I want to stay the only person in this case not confused.
WITNESS: Okay.
BRATTON: Well, because I am right now.
REFEREE: I can see you shaking your head. I would like to be the only person not confused because I'm going to have to make some decisions here.
BRATTON: Can I ask the respondent to ask, to clarify -- are you now asking questions about the 490 West End Avenue matter?

APPENDIX L

STEVENS: No.

BRATTON: Then I'm going to object on grounds of relevance.

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REFEREE: Well, let's, let's take it subject to connection and reserve your right to strike. He seems to think that it's got something to do with credibility, and let's hear about it.

STEVENS: okay. So now the, if you recall, what was the retainer fee in the Wexler case?

REFEREE: I don't know what the case was about. I don't know, I know the name Wexler and I know there was a phone call in Miami and there were three of you on the phone

STEVENS: Did you talk to the lawyers in the Wexler case?

WITNESS: I talked to the lawyers who had placed the lien. They were located in Pennsylvania. And the fee that I charged Miss Thompson was $300 an hour.

STEVENS: Thank you. Did I ever mention Lauri Thompson's name or did you know Lauri Thompson's name beforehand?

WITNESS: No. No.

STEVENS: Never, okay. Did I then thereafter speak to you about Lauri Thompson in the

REFEREE: Let's ask him what the next

APPENDIX M

PROCEEDINGS TRH - p.252

STEVENS: For the moment, okay.
REFEREE: Okay.
STEVENS: I met with Stan Chovnick. He was supposed to have come today as my first witness. And today I was informed at about 11 o'clock over the phone, right, that he apologizes but he can only make it here on Wednesday at 2 o'clock. So what happened is that it happened to be that today is the first day that I spoke with George Zelma on the subject, and he happen to have been in the room.
REFEREE: In what?
STEVENS: My room, my office, my room when that phone conversation took place, so he heard that. So what I wanted to do is I said, oh, well, that changes things. I then, right, appeared to be the person that has to testify first. I wanted Mr. Chovnick to testify first. So if I testify what I had to, what I wanted to do is ask for an application so that we could have Stan Chovnick here on Wednesday at 2 o'clock.
REFEREE: What's wrong with Tuesday?
STEVENS: I am not Stan Chovnick's, I don't have, I can't
REFEREE: We have subpoenas.
STEVENS: I understand that, but I don't,

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STEVENS: Thank you very much.
REFEREE: Thank you.
(off the record at counter 5432)

APPENDIX M

REFEREE: Back on the record. I chose the date for commencement of the hearing on sanctions to be Wednesday at 2 p.m. because that was the first time that Mr. Chovnick would be available. I did that under the mistaken impression that he was the sole witness on sanctions. While we were off the record, the respondent has informed me that he may have as many as four or five witnesses. Four witnesses, he's just raised his hand with four fingers of four witnesses on mitigation. Does the Staff have any witnesses on the question of sanctions?

BRATTON: No witness on the issue of sanction.

REFEREE: There being four witnesses on the question of sanctions that the respondent may wish to call, I think we'll start at 10 o'clock on Wednesday morning.

BRATTON: No objection.

STEVENS: I have not, I have no objection. I will do my best to bring, to contact those other two, three or four. Yes, I will. I will do my best,

APPENDIX N

STEVENS - DIRECT - TRH p. 344

STEVENS: Facts, okay, facts. There was that $300 agreement between me and Mitch --
REFEREE: What proof of it of that is there?
STEVENS: I have the proof of Stanley Chovnick who's willing to testify on Wednesday at 2 o'clock.
REFEREE: All right, fine. Let's assume that --
STEVENS: I have the proof of it by --
REFEREE: Let's assume that he testifies there was a $300 agreement, okay. Where do we go from here? Will you stipulate that if Mr. Chovnick is called Wednesday at 2 o'clock, he would testify that there was a retainer agreement of $300 an hour?
BRATTON: No, sir.
REFEREE: You won't, okay.
STEVENS: Sorry. That that statement was also stated in the office of George Zelma, that she stated under oath that that was not true, and it is true. And it's very significant because, okay -
REFEREE: Excuse me, just when your testimony of Mr. Chovnick comes in, you will point out and you will do the briefs, you will point out to me where she said something that's different from what he said and why I should believe him and not her.

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STEVENS: Fair enough. Mr. Arkin, was, was not at the office on December 11, 1996, at Mr. Chovnick's office.
BRATTON: Mr. Feldman, I apologize.
STEVENS: This is a fact.

APPENDIX N

BRATTON: Was your question to me would I stipulate that if Mr. Chovnick were to testify he would say there was a $300? Yes, I was, subject my cross, of course, I would stipulate to that. That I understand would be his testimony. I misunderstood the question, I'm sorry. I thought you asked if I would stipulate that was the fact.

REFEREE: Okay. Fine, so now we don't need Mr. Chovnick's testimony.

BRATTON: Well, I ask him, I ask him questions on relevance whether this entire thing is irrelevant. I would also have some dandy cross-examination questions of Mr. Chovnick himself.

REFEREE: Okay, all right.

BRATTON: But I don't think his testimony is relevant at all.

REFEREE: So that won't obviate the need to have Mr. Chovnick testify?

BRATTON: Yes.

REFEREE: All right. Go ahead.

TRH - p.434

piece of paper, right? You're going to produce an affirmation from Mr. Chovnick.

STEVENS: Correct.

REFEREE: Okay. So we don't need any adjournments to get an affirmation. I can keep the record open for the purpose of receiving the affirmation, for what it's worth.

STEVENS: Correct.

REFEREE: It's very hard and is that fact supposedly relevant to the case or is it character

APPENDIX N

affirmation?

STEVENS: Both

REFEREE: Relevant to the case, forget about it. The case, if you want to bring him in, I'll reopen the record and let him testify. I'm not going to take, I'll take so-called character evidence by affidavit, but I will not take evidence on the merits by affidavit.

STEVENS: But I thought, I spoke with Mr. Bratton, and he acknowledged that he would consent to that affidavit about --

BRATTON: Not exactly.

REFEREE: You have your own view of the world, sir. I heard Mr. Bratton say that he would not object to your offering affirmations or affidavits as to character.

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BRATTON: During the last session I did on the record also say that if Mr. Chovnick were to testify on the merits of the case, which at that time we were at, I would stipulate that he would testify that his fee was $300 an hour. I wouldn't stipulate as to the truth of that, but I would stipulate that would be what his testimony would be.

REFEREE: That's correct. I stand corrected.

BRATTON: Now if that is the subject matter of what the affirmation would say, I would stipulate that's what he would say if he were testifying.

STEVENS: No, did we not discuss that you would consent or admit or agree that he would testify to what is stated in his former affidavit and his letter?

APPENDIX N

BRATTON: Yes, without stipulating that, that's the truth.
STEVENS: No, I'm not saying that, but this is what the affirmation entails, and it has --
REFEREE: Why is he not coming here so he can be cross-examined?
BRATTON: though. I would still object on relevance
REFEREE: Okay. Why is he not coming here so

TRH - P. 441 - proceedings

stated that you were going to ask some general questions of Mr. Stevens as to his practice.
REFEREE: I still intend to do that.
BRATTON: Okay, because I have a question involving that too.
REFEREE: Okay. But I don't have two or three hours of questions.
BRATTON: I don't either.
STEVENS: Well, there are two messages, so I think, I'm under oath. There are two messages. I do not know, I never use the cell machine, cell phone, so I know it's him.
BRATTON: Are we off the record?
THE CLERK: Yes.
BRATTON: I think since we're off--
off the record at counter 1633)
REFEREE: Mr. Stevens, as I've previously indicated on Monday, you wanted an adjournment to Wednesday at 2 o'clock for the affidavit of Mr. Sam Chovnick. We're now informed that Mr. Chovnick is not, in fact, available at 2 o'clock this afternoon or at any other defined time. So Mr. Stevens says he would like to submit an affirmation from Sam Chovnick,

APPENDIX N

partly on the merits and partly as to character. Mr. Bratton has very generously agreed to

TRH - P. 442

accept an affidavit as to character but not on the merits because he wants, that if there's to be further testimony on the merits, to reopen the record for that purpose, he would want the right to cross- examine which he's entitled to, and I would have some questions on the merits as well.

BRATTON: I think the record should reflect I would also object to his testimony on the relevance as to the merits.

REFEREE: I can't make a judgment on the relevance of his testimony if he's not testimony. Mr. Stevens insists that the affirmation will cover both merits and character. If it does, I will not receive it in evidence. If he can limit it to character, I will receive it in evidence. On the other hand, I have some further questions of Mr. Stevens at this time, and if he can contact Mr. Chovnick and Mr. Chovnick wants to offer testimony on the merits, he can do so at 12 o'clock. Where's Mr. Chovnick's office?

STEVENS: 42nd and Madison.

REFEREE: Well, that's not too hard to get here in an hour. So we will go off the record now, and I will let Mr. Stevens, if he wants to call Mr. Chovnick, call him and find out what time he's

APPENDIX O

Richard Zelma
Attorney at Law
221 West 82nd Street
New York NY 10024
(212) 595-1928 Fax: (212) 362-4383
Admitted: NY & CA

Laurie Thompson
490 West End Ave
New York N.Y. 10024

November 15th 1997

Dear Ms.Thompson:

Re: Attorneys Fees

I have spoken with you on numerous occasions with respect to the attorneys fees and you have assured me that as soon as you will receive checks that I will be paid immediately. On November 14th. I went over to your office/home and had this bill ready for you but you informed me not to worry that the bill will be paid for. I must send this bill to you and be on the record so that there will be no misunderstanding. I am relying on your assurances and must protect myself.

The brief was filed and perfected on November 10th 1997. The time that we last met on the subject of attorneys fees was at my brother's office sometime in July of 1997. George Zelma's appearance was on August 8th 1997.

The time from that point in time and onward is divided as follows:

(1): 112.5 hours for preserving the record to the lower court: $100.00 per hr. = $11,250.00

(2) 259 hours for review of record; review of trial transcript; case authority; writing brief etc. for timely submission on November 10th 1997: $300.00 per hr. = $77,700.00

APPENDIX O

Total: $ 88,950.00 Less $ 10,000.00 received on November 12th 1997 Total Due: $ 78,950.00.

I am confident that the legal points of the brief were and are with merit and will lead to a favorable result. Although this is not guaranteed, there is a distinct chance that the judgment and underlying decision rendered by Judge Lehner will be modified and or reversed by the First Dep't. The substantive points raised in the brief from I-V are fully supported by the record and case authority. It is clear to me that actual occupancy, not prospective intent, is the proper standard of review for the court to apply. This is especially the case when the purchase of the apartment is 7 years after conversion, and, when the use of the apartment for professional medical purposes is permitted by the 6th amendment to the proprietary lease as well as the certificate of occupancy. The proper case authority regarding actual occupancy was not argued by your trial attorney and it was necessary to properly preserve the record in order for the appellate court to consider it. This is why the appeal was time delayed. And, as you are fully aware of, there were numerous attempts to settle the case especially in the initial stage when Stan Chovnick and I were both retained from December 11th 1996 to May of 1997.

As a result of this, coupled with the rent strike of your former sublessee Dr. Felix and our attempt to obtain the past use and occupancy from him right now, there were additional late applications. Once again, this is of import as the record demonstrates that the lower court was made aware of this.

I hope that you are fully satisfied with my work and that this will lead to a windfall triumph in the very near future.

Sincerely, Richard Zelma

APPENDIX P

THOMPSON - CROSS

TRH - P. 156

check immediately thereafter, is that correct, for $10,000?

WITNESS: No, I don't remember. I mean, if I issued a check for $10,000, I did but it was not in response to that letter.

STEVENS: Okay.

REFEREE: She testified that at that same time she was asking for an accounting of all the money she had previously given you.

WITNESS: Right.

REFEREE: Which amounted to a lot more than your bill.

STEVENS: Okay. I ask you to -- all right. Was there any written document seeking an accounting from me before April 14 of 1998?

WITNESS: Richard, I talked to you every day. I asked you for it verbally. Every day I asked you for an accounting.

STEVENS: Okay. Did you ever write that out to me?

BRATTON: Objection, asked and answered.

REFEREE: Sustained. Why, do you have a writing to support that? Was there a writing?

STEVENS: Yes. She then in April starts to ask for an accounting.

THOMPSON - DIRECT
TRH - P. 110

BRATTON: Yes.

REFEREE: What do you describe this as?

BRATTON: What would you describe this as?

WITNESS: Letter asking for money.

APPENDIX P

BRATTON: Okay.
WITNESS: But it's not a bill, and it's not a statement.
BRATTON: Okay. Now when you received this letter from Mr. Stevens, what did you do?
WITNESS: I asked him or a backup. I wanted to see an accounting of our hours, what was done, what time was expended.
BRATTON: Did you ask him about the money you had already paid him?
WITNESS: Yes, I mentioned that I had given him money already.
BRATTON: And what was his response to that?
WITNESS: No response.
BRATTON: Is there any --
REFEREE: I can't hear you. What did he say?
WITNESS: He did not respond.
BRATTON: Is there any reference in this letter to money that had previously been given to you

APPENDIX Q

STEVENS - DIRECT
TRH - P. 361

REFEREE: What other matters? Well, can he testify as to whether or not you withdrew the money?
STEVENS: No.
REFEREE: Can he testify as to whether or not it was in escrow? Can he testify as to whether or not it was commingled?
STEVENS: No, surely not.
REFEREE: Okay.
STEVENS: No, he could testify that Steve Arkin was not at the meeting on December 1, that Lauri Thompson was given numerous offers and rejected them, that the fees that we --
REFEREE: You just refuse to hear me. I'm not getting through to you.
STEVENS: You asked me a question.
REFEREE: No, you're not hearing me on the issue of what's relevant and material.
STEVENS: All right. I understand it. No he cannot testify to anything dealing with the escrow account, nothing.
REFEREE: Okay. And in order -- but isn't that what this is all about, the escrow account? Can he testify?
STEVENS: No, he cannot testify to anything having to do With the escrow account.

STEVENS - DIRECT
TRH - p. 362

REFEREE: Okay.
STEVENS: That's it. I know that.
REFEREE: Then why are we calling him for?

APPENDIX Q

STEVENS: Only to discredit the testimony of Thompson. It's surely --

REFEREE: I don't need the testimony of Thompson to prove that you withdrew the money from The escrow account.

STEVENS: No, you don't.

REFEREE: So even if I don't believe her --

STEVENS: Right.

REFEREE: -- I can sustain the charges, right?

STEVENS: I have a question for -- no, the answer is probably yes.

REFEREE: All right.

STEVENS: Probably.

REFEREE: All right.

STEVENS: But I will ask you this. If, not ask you this, my Real question is if she is caught, if she is not Speaking the truth, if hypothetically, she is not speaking the truth, wouldn't that be very relevant for purposes of proceeding in this case?

REFEREE: You can make that argument.

STEVENS - DIRECT
TRH - P. 363

BRATTON: I think the record --

STEVENS: That's, that is --

BRATTON: -- the record should reflect that Miss Thompson is not a party to this proceeding, she's a witness.

STEVENS: That may be, but the whole point is, is just as an informant has to be reliable before there's a judge that issues a warrant, right, so does

APPENDIX Q

the person coming here and testifying.

REFEREE: I don't need, I don't need her testimony. You've just conceded for the purpose of determining whether or not you had funds in the escrow account that were held in escrow and that you, which you used

STEVENS: Right.

REFEREE: I don't need her testimony, you've just conceded.

STEVENS: I conceded --

REFEREE: I don't have to believe her or not believe her on the question of whether you withdrew the money. I have the documentary evidence. I don't have to believe her or not believe her on the question of, of whether you've earned the fees. That's irrelevant.

STEVENS: I understand that, but the

TRH - p. 364

reason, this is my legal point. The reason why you know of this is because she walks in here and lies all over the place.

REFEREE: No, the reason I know of it is because I see an escrow agreement in evidence.

STEVENS: And how did you get that?

REFEREE: It's not important.

STEVENS: It is important. It is important, sir.

REFEREE: How did I get it?

STEVENS: Right.

REFEREE: The Staff gave it to me.

STEVENS: How did they get it?

REFEREE: From the, I don't know how they got it.

STEVENS: They got it from her.

REFEREE: I asked you whether, a question with the time,

APPENDIX Q

I asked you whether you questioned the authenticity of any of the Staff exhibits, and you said no.

STEVENS: No, that's not the issue. The issue from my prospective is that there's a pathological liar who walks in here --

REFEREE: Well, all right, that's your perspective. I've had enough --

APPENDIX R

PROCEEDINGS
TRH - P. 328

REFEREE: It's a very simple question, Mr. Stevens. We're back on the record. Do you want to, do you insist on your right to sit in the stand, in the witness chair and read what you wrote or are you willing to offer it as an exhibit and have it part of the record subject to objections.

STEVENS: This is what I would like to do, I would like to go over everything off the top of my

TRH - p. 329

head and use this as a guidance, because this is what I've been working on for the past two days.

REFEREE: Okay.

STEVENS: Okay. And then, because I don't want to miss out on exhibits, that, and I want to make sure that the exhibits are included.

REFEREE: Well --

STEVENS: And those are the exhibits. I want to make sure that that is done.

REFEREE: Now, I'm going to, fine, if that's what you want to do.

STEVENS: Yes.

REFEREE: And I'll tell you what I'm going to do. I'm going to limit you now, I'm going to limit you to relevant testimony.

STEVENS: Okay. I would just like then to submit this evidence that I have, the testimony that was ready to set forth that you said that I could do, and is that all right?

REFEREE: This is a, this is a writing which you had intended to read as your testimony under oath?

APPENDIX R

STEVENS: With, with all of these exhibits.
REFEREE: And you're submitting it in lieu of oral testimony, is that correct?
STEVENS: Correct.
REFEREE: I don't know what the relevance is, I don't know how competent it is, or how material it is, but you want it in, we'll take it.
STEVENS: Thank you.
BRATTON: That'll be a Respondent's S.
REFEREE: Excuse me?
BRATTON: Respondent's S.

APPENDIX S

PROCEEDINGS

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REFEREE: I don't want your testimony now. I want it under oath

STEVENS: Okay. I will give it to you under oath.

REFEREE: But then don't give it to me now.

STEVENS: All right, I won't. The point is that there was an account, The point is there was an agreement, that there was, the time is documents, that I was partially successful on this case, that six months after the bill, she wakes up one morning and says there's no written retainer agreement and claims that she overpaid me and Stan Chovnik. That was her entire basis six months afterwards
This section of the Disciplinary Rule states: "The portion belonging to the lawyer or law firm may be withdrawn when due." This was the entire issue, 9-102 (b) (4)

REFEREE: It's settlement money. That's when an insurance draws out a check to the lawyer and the client, is deposited in the escrow account, and there is a written retainer. That's what it's applicable to. It's not applicable to your just being to use self-help to withdraw money from an escrow account.

REFEREE: That's no defense because -- go ahead.

WITNESS: If it is not an absolute defense, it certainly mitigates the intent

REFEREE: That mayor may not be if we get to the issue of sanctions, but on the issue of
liability, which is where we are now, we're

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not at sanctions, what, of what possible relevance is there?

WITNESS: Liability to who, the bonding company?

REFEREE: No, no, no, liability to the, to the bar, to the Disciplinary Committee, to the Appellate Division for having violated the Code of Professional Responsibility

WITNESS: The only possible persuasion that I have is that hopefully the evidence will demonstrate that I had the approval, right, of Miss Thompson.

REFEREE: I'm sorry, it's irrelevant as a matter of law.

TRH - p.348

STEVENS: All Right.

REFEREE: -- I seem to have great difficult in communicating. You know, I've been practicing law a long time, and it has not been that difficult for the most part.

STEVENS: Right.

REFEREE: But Please understand that if the retainer agreement, in my view at this point of time, and you can in a brief persuade me otherwise, that if the retainer agreement was $1,000 an hour, and you had put in $100,000 worth of work or $3,000,000, worth of work, and you were owed $3,000,000 you still would not be entitled under the law to withdraw that money from the escrow for your own personal purposes. Now, if you have anything with which to dissuade me of that, I will listen. But all this stuff about Chovnick and 300 or 100 just is irrelevant.

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TRH - p.50

STEVENS: The point is that the attorney's fees were due, the account stated was set forth. She does not have a right to come up with some kind of, and he consented.

REFEREE: And you claim you had a right to self-help. You didn't have to assert a lien, you didn't have to go to court to assert a lien.

STEVENS: No, I

REFEREE: You just had the right of self-help, is that your defense?

STEVENS: No, that is not my defense. That is not unequivocally my defense. My defense is is that there was, that was a, that the attorney's fees were due and that she consented to them, to my withdrawing the funds. That is my defense.

REFEREE: Well, if she consented to your withdrawal of the funds, that's one thing, but that doesn't take care of the problem with the bonding company.

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SUPREME COURT, APPELLATE DIVISION
FIRST JUDICIAL DEPARTMENT
DEPARTMENTAL DISCIPLINARY COMMITTEE

DENIS MCINERNEY. ESQ.
CHAIRMAN

April 28, 1998
ADMONITION

PERSONAL AND CONFIDENTIAL

Richard S. Zelma, Esq.
221 West 82nd Street
New York, New York 10024

Re: Sua sponte complaint
Docket No. 0624/96

Dear Mr Zelma:

The Committee has completed its investigation of the above-referenced sua sponte complaint. As a result of that investigation, the Committee found that there was misconduct on your part in violation of DR 6-101(A) (1) and DR 7-102 (A) (2) of the Lawyer's Code of Professional Responsibility (the "Code").

In early 1992, you were retained by Andrew Levine to represent him after he was restrained by a Westchester Family Court from contact with his daughter Shawne when the court found he abused her. Afterwards, on Levine's behalf, you filed a section 1983 civil rights complaint against Shawne's mother, Westchester County authorities, state court judges and others in Manhattan federal district court. The complaint essentially alleged that Levine's "rights" were violated when the defendants failed to investigate the

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possibility that someone other than Levine abused Shawne after certain allegedly-relevant evidence in this regard was brought to their attention. (Levine v. County of Westchester et al., 92 Civ. 1702 [S.D.N.Y.] [JES]).

Prior to filing Levine's complaint, you had never litigated a federal case before. Moreover, during the course of the action, you never consulted with other attorneys who had experience with federal civil rights actions.

There are fundamental and long-settled rules of law that federal courts do not review child custody determinations and that federal district courts do not hear "appeals" from state court decisions of any type. Accordingly, the federal district court hearing the Levine case summarily dismissed it and imposed sanctions against you pursuant to Federal Rule of Civil Procedure 11.

DR 6-101(A) (1) of the Code prohibits a lawyer from "handl[ing] a matter which the lawyer knows or should know that he . ..is not competent to handle, without associating with a lawyer who is competent to handle it." DR 7-102(A) (1) prohibits a lawyer from "fil[ing] a suit.. .on behalf of [a] client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." By your failure to recognize your inability to adequately handle a federal section 1983 civil rights case without assistance, and by your action in instituting the Levine suit when you should have known it was frivolous, you violated the two above disciplinary rules and, accordingly, are hereby admonished for your misconduct. Please be further advised that, in the event that you are again found to have filed a frivolous law suit, the Committee may seek the imposition of public discipline.

Pursuant to the Committee's Rules and Procedures, you may, within thirty (30) days, request reconsideration of this Admonition or demand that formal proceedings be

instituted before a Special Referee. 22 N.Y.C.R.R. §605.8. If you demand that formal proceedings be instituted, this Admonition will be vacated and formal charges will be presented. The Special Referee will not be bound by this Admonition, but may take any appropriate action authorized by the Committee's Rules and the Rules of the Appellate Division, First Department, including a reprimand or referral to the Court.

Very truly yours,

DENIS MCINERNEY

Two Signatures

APPENDIX U

Richard Zelma
Attorney at Law
221 West 82nd Street
New York NY 10024
(212) 595..1928 Fax: (212) 362-4383
Admitted: NY & CA

Departmental Disciplinary Committee May 5th 1998
Supreme Court, Appellate Division
First Judicial Department
41 Madison Avenue
New York, N.Y. 10010
Attention: Denis Mcinerney
BY HAND

Dear Mr. McInerney:

Re-Consideration

This letter is in response to a verbal opinion by Mr. Supple concerning my letter dated May 1st 1998. [enclosed]. I respectfully object as follows:

The reason that i will not object to the finding is by virtue of issue and claim preclusion. Because the Circuit Court had ruled that the case was "frivolous" the state court will not review this ruling. Even though in my opinion this ruling is incorrect. I fully understand that this is a waste of time. This is the sole reason that I will not object to your finding of private admonition. The letter sent by Mcleod had nothing to do with your decision. Had this letter been the basis for the committees investigation, I would now be seeking a hearing. McLeod would be called as a witness. She arguably aided and abetted the crime of rape. The subject child was in all likelihood raped and this is medically impossible to attribute to the biological father. I have spoken

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to a few criminal lawyers and there is no doubt that a district attorney could have gotten an indictment. The child; father; and two child abuse experts; [Sgroi and Green]; the nurses and Northern Westchester Hospital; and the documented arrests of the stepfather for abuse on December 26th 1986, and July 2nd 1987, would be sufficient to persuade a grand jury that the stepfather should be indicted. If this would be brought to trial and the stepfather would have been found guilty, it appears that the mother is guilty for aiding and abetting the crime. In that event, this is a felony. Furthermore, by revealing this to Mcleod on your own, you are publicizing an otherwise private admonition. McLeod can then inform everyone in the world of this decision, thus undermining the entire purpose of having it private to begin with. This conflicts with the entire basis for letting this decision go.

Under these circumstances, to send Ms. Mcleod this admonition is uncalled for. I respectfully request that you reconsider your position as far as informing Ms. Mcleod. She has not asked for any determination from your committee. To come forward with a letter of your own over 1 and 1/2 years after she sent a letter to you because she was upset that I was going to appeal a decision that I had every right to do, is an excessive and arbitrary form of behavior.

I will not object to the underlying finding that was made as it is futile to continue to argue this. Thank you for your attention to this matter.

cc: Ms. Stein & Mr. Supple

Very truly yours

Richard Zelma

APPENDIX V

SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court August 6, 2002

Mr. Richard Stevens
221 West 82nd Street
New York, NY 10024

RE: In the Matter of Discipline of Richard Stevens, 0-2331

Dear Mr. Stevens:

The Court today entered the following order in the above-entitled case:

"Richard Stevens, of New York, New York, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this court."

Sincerely,
William K. Sutter
Clerk
By
Francis J. Lorson
Chief Deputy Clerk

Appendix W1

Before the Departmental Disciplinary
Committee of the Appellate Division of
the Supreme Court State of New York
First Judicial Department

In the Matter of the Richard Zelma Esq.	))) PRE-HEARING) STIPULATION) RP NO. 32/2000) Before:) Justin N. Feldman)Esq. Referee

The parties to the proceedingt above, as and for their Pre-hearing Stipulation submit the following:

Both parties reserve the right to submit additional stipulations prior to commencement of the hearing.

1. Amendments

1. Paragraph 4, a second sentence, is modified to read, " On August 13, 1977, the Supreme Court, New York County, entered judgement against Thompson and awarded opposing counsel, $ 95,000 in legal fees.

2. Paragraph 5, line 4 of the charges is changed from "August 7, 1997" to August 6, 1997."

3. Paragraph 12 line 1 of the charges is changed from October 23, 1998" to October 27, 1998"

4. Paragraph 13, line 1 of the charges is changed from "October 22, 1998" to "October 27, 1998"

2. Facts not in Dispute

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1. Respondent was admitted to practice as an attorney and counselor-at-law in the State of New York by the Appellate Division of the First Department, on July 26, 1982.

2. At all relevant times respondent has maintained an office for the practice of law in the First Department at 221 West 82nd Street, New York, New york, 10024.

3. In 2000, respondent legally changed his name to "Richard Stevens."

4. Commencing in December 1996, Laurie Thompson, ("Thompson") retained respondent to appeal her apartment sublet matter, Laurie Thompson v 490 West End Corp. et. al. (Sup Cr. N.Y. index 130665/94). Thompson also retained Stanley Chovnick, Esq. to help conduct settlement discussions. Thre was no written retainer agreement between respondent and Thompson.

5. By undertaking dated August 6, 1997, (and entered on August 15, 1997) the Fidelity and Deposit Company of Maryland (Fidelity) posted a bond on Thompson's behalf for counsel's legal fees, plus costs and interest.

6. By check dated July 17, 1997 for $50,000 (originally furnixhed to respondent for settlement purposes) and by check post-dated August 9, 1997 for $ 65,000 Thompson supplied respondent with $ 115,000. On or about August 7, 1997, respondent deposited into his Dime Savings Bank account, number # 5286016279 and designated "Richard Zelma IOLA Account" (the "Account"). Thompson's 65,000 check, together with the prior $ 50,000 check deposited by respondent into his account, raised the amount respondent held in escrow pursuant to respondent's April 6, 1997 letter for Fidelity, discussed infra, on behalf of Thompson to $ 115,000 and raised the overall balance in his account to $ 165,452.40.

7. By letter to Fidelity dated August 6, 1997, respondent stated the following:

> This will confirm the fact that my office is holding $ 114,000 in my escrow account, to indemnify your company for any loss it may incur in connection with the appeal bond issued for my client Laurie Thompson, up to the amount of $ 95,000.
>
> We hereby agree to release said funds to you upon receiving a statement signed by one of your officers to the effect that you have been called upon to make any payment of loss, attorneys fees, or other expenses, by reason of executing the appeal bond on behalf of the principal Laurie Thompson, and in favor of the obligee, 490 West End Ave., in the amount of $ 95,000.
>
> These funds will not be released to anyone else, including substitute counsel without first receiving from youi written approval.

7. By October 22, 1997, the balance in Respondents account was $ 85,375. By August 13, 1998, the balance was $ 45.23.

8. Between August 6, 1997 and August 13, 1998, respondent made cash and ATM withdrawals from the account.

9. On or about October 27, 1998, the Court of Appeals denied Thompson's motion for leave to appeal the Appellate Division First Department's order modifying the trial court's decision against Thompson.

3. Documents to be Offered in Evidence during the Hearing:

Appendix W4

The staff will offer the following numbered exhibits:

(1)Undertaking on appeal by Fidelity and Deposit Company of America, Thompson v 490 West End Ave. Apartments Corp. entered August 15, 1997.

(1) Letter from respondent to Fidelity and Deposit dated August 6, 1997.

(2) Monthly statements from respondent's Dime Savings Bank "Richard Zelma IOLA account," No., 52080016279 from July 23, 1997 to April 22, 1999.

(3) Letter from respondent to Laurie Thompson to respondent dated November 15, 1997

(5) Letter from respondent to Laurie Thompson dated February 6, 1998.

(6) Letter from Laurie Thompson to respondent dated April 14, 1998

(7) Letter from Laurie Thompson to respondent dated April 27, 1998.

(8) Handwritten time records of respondent for Laurie Thompson's matter

(9) Typed summation of Exhibit 8 prepared by Laurie Thompson

(10) Letter from respondent to Laurie Thompson dated August 6, 1998

(11) Letter from Laurie Thompson dated August 8, 1998

(12) Letter from Fidelity and Deposit to respondent dated September 21, 1998

(13) Letter from respondent to Fidelity and Deposit dated October 27, 1998

(14 Letter from respondent to Fidelity dated August 16, 1999

(15) Letter from respondent to Stanley Colleseno Esq. dated August 26, 2000.

Respondent's Exhibits:

A. Chovnick affidavit, dated December 15, 1999
B. Thompson fax to Chovnick dated May 4, 1997
C. Chovnick letter to Thompson dated June 4, 1998
D. Brief for plaintiff filed with Appellate Division First Department November 1997.
E. Check from Thompson to respondent, dated November 15, 1997.
F. Bills of George Zelma dated September 1, 1997 and September 10, 1997.
G. Respondent letter to Thompson dated May 14, 1998
H. Respondents letter to Thompson dated July 20, 1998
I. Thomposon's letter to respondent dated August 4, 1998
J. Respondents letter to Thompson dated December 29, 1998

4. <u>WITNESSES TO BE CALLED</u>:

By staff counsel: 1. Laurie Thompson
2. Stanley Collesano Esq.

By respondents:
1. Richard Zelma Esq.
2. Stanley Chovnick Esq.

Dated: New York NY
April 19, 2001

By: Richard Supple Esq.	Disc Committee
Attorney for respondent	
Richard Stevens	Mr. Bratton Esq